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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LOGIX COMMUNICATIONS, L.P., DOING BUSINESS AS LOGIX COMMUNICATIONS, PETITIONER

v.

THE PUBLIC UTILITY COMMISSION OF TEXAS, PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS, JULIE CAURTHERS PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS, BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS, AND SOUTHWESTERN BELL TELEPHONE, L.P., DOING BUSINESS AS AT&T TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the de novo appeal, the United States Court of Appeals for the Fifth Circuit affirmed the United States District Court's ruling granting summary judgment for the Pubic Utility Commission of Texas ("PUCT"). In the federal Telecommunications Act of 1996, Section 251 requires incumbent local exchange carriers ("ILECs") to provide to a requesting carrier facilities on an unbundled basis ("UNEs") when the requesting carrier or competitive local exchange carrier ("CLEC") would be impaired without such access. The Federal Communication Commission ("FCC") issued new rules as part of its *Triennial Review Remand Order* ("*TRRO*") intended to support this impairment test. In particular, in 47 C.F.R. § 51.5, the FCC defines a Business Line to utilize those Business Line tallies as a key proxy for determining when a CLEC is no longer impaired without access to certain higher capacity loops and transport.

1. Whether the Court below failed to properly follow the Federal Communications Commission's Rule 47 C.F.R. § 51.5 by allowing UNE loops used to serve residential customers to be counted as a Business Line.

2. Whether the Court below failed to properly follow the Federal Communications Commission's Rule 47 C.F.R. § 51.5 by allowing unused capacity and capacity used for non-switched data service on a high capacity UNE Loop to be counted as a Business Line.

RULE 29.6

Petitioner, pursuant to Rule 29.6, states that it is a privately held company. There is no publically held corporation that owns more than 10% of its stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 521 F.3d 361 (5th Cir. 2008). The opinion of the United States District Court for the Western District of Texas – Austin Division was not reported. Both of these opinions are included in the Appendix to this Petition.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the District Court's order granting summary judgment on behalf of the Public Utility Commission of Texas ("PUCT"), was handed down on March 17, 2008. A timely petition for rehearing was denied on April 11, 2008. The instant Petition is filed within 90 days of that decision, pursuant to Supreme Court Rule 13. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

47 U.S.C. § 251:

> (c) Additional obligations of incumbent local exchange carriers
>
> (3) Unbundled access
>
> The **duty to provide**, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to **network elements on an unbundled basis** at any technically feasible point on rates, terms,

and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. . (emphasis added)

47 U.S.C. § 251:

(d) Additional obligations of incumbent local exchange carriers

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the **Commission shall consider, at a minimum, whether--**

(A) access to such network elements as are proprietary in nature is necessary; and

(B) **the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.**

(emphasis added)

47 C.F.R. § 51.5:

Definitions

Business line. **A business line is an incumbent LEC-owned switched access line used to serve a business customer**, whether **by the incumbent LEC itself or by a competitive LEC that leases the line** from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. **Among these requirements**, business line tallies (1) **shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services**, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as **one line**. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines. (emphasis added)

Telecommunications service. The term telecommunications service refers to the **offering of telecommunications for a fee directly to the public**, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. (emphasis added)

STATEMENT

Petitioner, along with numerous other parties, participated in the regulatory proceedings at the Public Utility Commission of Texas ("PUCT") to implement the federal Telecommunications Act of 1996 ("FTA") and the Federal Communications Commission ("FCC") regulations in the context of the FCC's *Triennial Review Remand Order* (*"TRRO"*). One of the predominant issues in that proceeding was the implementation of the FCC's definition of a Business Line contained in 47 C.F.R. § 51.5, which affects the application of the FCC's impairment test. *47 U.S.C. § 251(d)(2)(B).* Petitioner appealed determinations of the PUCT relating to the compliant methodology for counting Business Lines pursuant to FCC requirements because the PUCT determinations allow incumbent local exchange carriers ("ILECs") to count certain lines used to service residential customers as a Business Line. Moreover, Petitioner challenged the PUCT order authorizing the counting of unused capacity and non-switched data service as a Business Line in spite of the fact that the FCC's regulation defines a Business Line as a "switched access line used to serve a business customer".

At the District Court, Logix moved for an order granting summary judgment and against the order approving the erroneous counting methodology issued by the PUCT, relevant excerpts of the PUCT's order are included in the appendix hereto. Similarly, Logix sought to enjoin enforcement of the related order of the PUCT approving an interconnection agreement amendment implementing this erroneous decision. The District Court denied Logix's Motion for Summary Judgment and granted summary judgment on behalf of

the PUCT.

On December 29, 2006, Logix appealed the District Court decision to the United States Circuit Court for the Fifth Circuit. In its decision of March 17, 2008, the Fifth Circuit Court denied Logix's appeal. On April 11, 2008, the Fifth Circuit Court denied Logix's timely filed motion for rehearing. In doing so, that court failed to issue an opinion that complies with the requirements of the FCC's Rule 47 C.F.R. § 51.5 as expressed by the full text of that Rule.

Introduction

Congress passed the Telecommunications Act of 1996 to encourage and expand competition in communications markets. In the Act, Congress enacted language intended to open previously monopolized wireline markets. In exchange for taking statutory steps to support competition in their local markets, the Regional Bell Operating Companies ("RBOCs"), such as SBC/AT&T, were given the opportunity to enter the long distance market. Such long distance relief was conditioned by Section 271 of the Act whereby the RBOC was required to make a showing that they have taken the steps required to open local markets to competition. Terms, conditions, and rates governing the relationship between incumbents and competitors are managed through interconnection agreements that are administered by the state utility commissions.

The PUCT is required to comply with the rules of the FCC when handling interconnection issues pursuant to federal law. 47 C.F.R. § 51.5 defines what may be counted as a Business Line mandating that only a "switched access line used to serve a business

customer" may be counted as a Business Line. When read as a whole 47 C.F.R. § 51.5 succumbs to the unambiguous interpretation that to be counted as a Business Line, a line must be used to serve "switched access" service to a "business customer". This interpretation is consistent with the FCC's *TRRO* discussion of the rationale behind the 47 C.F.R. § 51.5 Business Line definition and the impairment test for which the Business Line count is utilized as a proxy, i.e. the test is premised on higher "revenue opportunities" available to competitors when serving business customers and the greater "business line density". *See TRRO ¶¶ 93 and 103.* Instead, the PUCT authorized SBC/AT&T to include within the count lines that do not meet the definition of a Business Line. Thus, the Business Line counts are improperly inflated leading to inaccurate application of the FCC's mandatory impairment test.

The PUCT failed to properly implement the FCC requirements and the United States Circuit Court for the Fifth Circuit erred by denying Logix's challenge to the PUCT's erroneous rulings and upholding the District Court's grant of summary judgment on behalf of the PUCT.

In the Rules promulgated by the *TRRO*, the FCC conditioned certain unbundling obligations relating to high capacity loops and dedicated transport on the specific characteristics of incumbent local exchange carrier ("ILEC") wire centers associated with those unbundled network elements ("UNEs"). The FCC explicitly held that when specific characteristics are met, impairment continues to exist and the ILECs must continue to provide the associated facilities as UNEs. See *TRRO ¶¶ 93-94 and 47 U.S.C. § 251(d)(2).*

As a result, competitors are directly harmed because the use of a methodology that inflates the Business Line count deprives them of access to certain UNEs when the FCC's test properly applied mandates such access.

Pursuant to the procedural rules of the PUCT, SBC/AT&T filed a petition for dispute resolution against competitive local exchange carriers ("CLECs"), including Logix The PUCT issued its Order Approving Methodology on April 7, 2006. Logix, with the Joint CLECs, filed a Motion for Reconsideration of the PUCT's decision with regard to the counting of Business Lines on April 27, 2006. That Motion was denied by PUCT order on May 31, 2006. Subsequently, the PUCT issued its June 16, 2006 Order Approving Contract Language. The Order Approving Contract Language operationalized the decisions relating to the counting of Business Lines, which Logix shows were in error.

Logix filed its appeal with the District Court in July 2006 and subsequently filed its Motion for Summary Judgment on August 31, 2006. The PUCT and SBC/AT&T filed responses to that Motion on October 11, 2006. Logix's reply was filed on November 10, 2006. The District Court ruled on the Motion for Summary Judgment on November 6, 2006 denying Logix's Motion and granting summary judgment in favor of the PUCT. Logix filed a Motion to Alter Judgment on November 10, 2006. The District Court's order denying Logix's Motion to Alter Judgment was filed on November 15 2006. On December 29, 2006, Logix appealed the District Court decision to the United States Circuit Court for the Fifth Circuit. The decision of the United States Court of Appeals for the

Fifth Circuit was handed down on March 17, 2008. A timely petition for rehearing was denied on April 11, 2008.

This Petition challenges the PUCT's orders that fail to properly apply the FCC's rules implementing the 1996 Act. Petitioner seeks review of the Fifth Circuit Court opinion which upheld the PUCT's rulings. Petitioner specifically challenges the PUCT's decisions to count residential, unused, and data-only lines as Business Lines. This Petition also seeks review of the conflicting opinions among implementing jurisdictions.

REASONS FOR GRANTING THE PETITION

Communications continues to be a critical market sector as the United States competes in a global, high-tech, information economy. At the forefront of the nation's reach into the new communications age from a legislative perspective is the federal Telecommunications Act of 1996. Since the enactment of the FTA, the FCC has made a number of efforts to furnish economic standards to implement statutory tests to determine where ILEC's remain obligated to provide facilities to competitors as unbundled network elements ("UNEs") The intent of the FTA and the FCC regulations is to have the economics of the marketplace affect regulatory rules rather than applying random rules without regard to the market. The issue in this case – applying the FCC's definition of a Business Line – directly applies to the test developed by the FCC for access to some of the most critical facilities, unbundled loops and transport at capacities of DS1 and DS3. Despite the FCC's focus on the economics and characteristics of the market, the order of the United States Circuit Court for the Fifth Circuit, in this de novo appeal, has let stand the lower

court ruling upholding a decision to allow the counting of Business Lines to be improperly and substantially inflated by counting certain residential, unused, and data-only lines as a Business Line in violation of the FCC's rules.

I. Transition of the Telecommunications Industry to a More Competitive Model is a Principal Function of the FTA and the FCC's Implementation thereto.

The passage of the federal Telecommunications Act of 1996 ("FTA" or the "Act") began a new era in the telecommunications industry. The FTA sought to transition the local telephone service market from a monopolistic market to one characterized by greater competition with an objective to have "local service, which was previously operated as a monopoly overseen by the several states, be opened to competition according to standards established by federal law." See *MCI Telecomm. Corp. v. Bell Atl-Pa.*, 271 F.3d 491, 497 (3d Cir. 2001).

This transition would be accomplished in part by mandating certain statutory requirements that require: (1) interconnection between all carriers; (2) access by competitors to unbundled network elements ("UNEs") from the incumbent local exchange carriers ("ILECs"); and (3) resale of the services the incumbent provides its end users. In this way, Congress mandated affirmative steps to restructure the industry to a more competitive model. *47 U.S.C. §§ 251(b)(1), 251(c)(3), and 251(c)(4)*, respectfully.

Pursuant to the Act, ILECs, such as SBC/AT&T, are required to negotiate an

"interconnection agreement" ("ICA") with CLECs, such as Logix. When an ILEC and a requesting carrier cannot agree on reasonable terms, conditions, and/or rates for the services that the ILEC must provide, the FTA allows the state regulatory body - here, the Public Utility Commission of Texas ("PUCT") - to arbitrate the disputes. *47 U.S.C. § 252(b)(1).* The underlying proceeding involved multiple such arbitrations intended to adopt certain counting methodologies necessary to implement the FCC's Rules and the related *Triennial Review Remand Order ("TRRO").*[1]

The issue is compliance with the FCC's Rule defining a Business Line, i.e. the FCC's requirement **that only lines providing switched access service to a business customer may be counted as a Business Line.**

Specifically related to this proceeding, the Act requires ILECs to share their network with competitors so the competitors can use components of the incumbents' networks – "unbundled elements" or "UNEs" – to provision their own services. *AT&T v. Iowa Utils. Bd., 525 U.S. at 371. 47 U.S.C. § 251(c)(3).* More specifically, this Court explained in *Iowa Utils. Bd.* that 47 U.S.C. § 251(c)(3) imposes on an ILEC the duty:

> to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory

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[1] Order on Remand, In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (Feb. 4, 2005) ("*TRRO*").

> access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

To determine where these UNEs are to be made available to CLECs, the FTA directs the FCC to consider, at a minimum, whether "access to such network elements as are proprietary in nature is necessary" to the competing carrier and whether "the failure to provide access to such network elements would impair the ability of" the competing carrier to offer its services. *47 U.S.C. § 251(d)(2).* The orders and rules of the FCC are issued to implement these statutory directives. The disagreements on counting methodology for a Business Line directly affects where the FCC's impairment test is met, i.e. where SBC/AT&T's unbundling obligations are mandated by the FCC.

II. The Intent of the FCC is Determined by Giving Effect to the FCC's Entire Rule – Read as a Whole.

A. Use of the Business Line tally as a Proxy for Potential Competition

In its Rules and *TRRO*, the FCC revised the test for when various unbundled network elements ("UNEs") shall be made available to a requesting carrier, such as Logix, by an ILEC, such as SBC/AT&T. As part of the new rules, the FCC stratified locations, i.e. wire centers, into three tiers depending on the number of Business Lines and fiber-based collocators. For the purpose of the requirement to obtain high capacity transport UNEs, the FCC developed a disjunctive test for classifying wire centers

based on the number of Business Lines or the number of Fiber-Based Collocators. For high capacity loops, the FCC developed a similar but conjunctive test. The count of Business Lines is therefore critical to the application of the FCC's impairment test.

47 C.F.R. § 51.5 defines what may be counted as a Business Line mandating that only a "switched access line used to serve a business customer" may be counted. When that Rule is read as a whole and in a manner that is internally consistent, the Fifth Circuit Court's opinion is found to be in error. Further, the FCC, in the *TRRO*, discusses the factual rationale behind the 47 C.F.R. § 51.5 Business Line definition and the impairment test for which the Business Line count is utilized as a proxy. Higher "revenue opportunities" associate with serving business customers and the greater "business line density" are the underpinning for the FCC's conclusion that there should be adequate potential competition through non-ILEC facilities to lift the impairment finding. Business Line thresholds are the proxies used by the FCC for such potential competition. *TRRO ¶¶ 93 and 103.* Instead, the opinion below upholds the PUCT decision, which ignores the economic underpinning of the FCC's ruling, by authorizing SBC/AT&T to include within the Business Line tally lines that do not meet the definition of a Business Line. The result is the improper inflating of the Business Line tally and the inaccurate application of the FCC's mandatory impairment test to remove access to UNEs even when the FCC's test for potential competition is not met.

B. The Business Line Definition

The FCC's Business Line definition includes several criteria that must be met before a line can be categorized as a "Business Line" for purposes of the *TRRO* impairment analysis. Logix and SBC/AT&T disagree as to the proper application of the specific requirements to follow when counting a Business Line pursuant to 47 C.F.R. § 51.5 and the *TRRO*. The PUCT erroneously adopted the methodology proposed by SBC/AT&T, which inflates the count, and therefore, takes away competitor access to the UNE loops/transport even when the FCC's test properly applied would demonstrate that impairment continues to exist.

The FCC's "Business Line" definition consists of four sentences. The fundamental dispute between the parties is over how those sentences should be interpreted. Petitioner sought throughout the proceeding to have all four sentences read **together** and applied in a manner that is **internally consistent**. This request was nothing more than a request that the Rule be interpreted consistent with basic canons of statutory construction, which call on the decision-maker to give effect to all – not just some – provisions of a regulation or statute. As the this Court stated in 1849 and has quoted often:

> in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole, and to its object and policy. *United States v. Heirs of Boisdore*, 49 U.S. 113, 122, 12 L.Ed.2d 1009 (1849).

The Fifth Circuit Court's order did not apply that same principal, but instead, consistent with SBC/AT&T's advocacy read language in isolation while ignoring specific language in the Rule, when read together, shows the Circuit Court's conclusion to be erroneous. By following SBC/AT&T's flawed approach, the Circuit Court's decision conflicts with over 150 years of U.S. Supreme Court precedent on statutory interpretation that makes clear that the interpretation of a statute or regulation "begins where all such inquires must begin: with the language of the statute itself."[2] And, where the language is plain, "the sole function of the courts is to enforce it according to its terms"[3] with the plain meaning being deemed to be conclusive except in rare cases.[4] Unless there is an explicit statement to the contrary, words are to be given "their ordinary and usual sense and with the

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[2] *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L. Ed.2d 290 (1989) (*Ron Pair Enterprises*). See also *Estate of Cowart v. Nicklos Drilling, Co.* 505 U.S. 469, 475-476, 112 S.Ct. 2589, 2594, 120 L. Ed2d 379 (1992)(stating, "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.); *Landreth Timber Co. v. Landreth* 471 U.S. 681, 685, 105 S. Ct. 2297, 2301 (1985); *Copper/T. Smith Stevedoring Co. v. Liuzza*, 293 F.3d 741, 745 (5th Cir. 2002); and *Johnson v. McNeil*, 217 F.3d 298, 301 (5th Cir. 2000), *U.S. v. Meeks*, F.3d. 741, 744 (5th Cir. 1995).

[3] *Ron Pair Enterprises*, 489 U.S. at 241, 109 S.Ct. at 1030. See *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194 (1917). See also *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149-1150 117 L. Ed.2d 391 (1992)(stating that [w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'." *quoting Rubin v United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981).

[4] *Rubin*, 449 U.S. at 430, 101 S. Ct. at 701; *Johnson v. McNeil* at 301; see also *Germain*, 503 U.S. at 253-254, 112 S. Ct. at 1149.

meaning commonly attributed to them."[5] Finally and directly applicable here, the language will be reviewed in its entirety giving meaning to all provisions to effectuate the intent and policy of the whole.[6]

The first sentence of the Business Line definition states:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC.

This sentence establishes three basic criteria for finding that a line qualifies as a Business Line: (1) only **business** lines (as opposed to residential) are to be counted; (2) the line must be a switched access line, i.e. a voice line; and (3) whether the line should be counted is not affected by whether the service provided by SBC/AT&T or by a competitive local exchange carrier ("CLEC") leasing the line from SBC/AT&T.

These three conditions comport with the FCC's rationale for using Business Lines as a proxy for competitive activity. In the *TRRO*, the FCC found that "the record shows a correlation between the number of **business lines** and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served via that wire center." *TRRO ¶ 43 (emphasis added).* The "revenue opportunities" referenced by the FCC arise primarily from the competitors' ability to serve a large number of business customers in the particular wire center (as

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[5] *Caminetti* at 242 U.S. at 485-486, 37 S.Ct. at 194.

[6] *Boisdore*, 49 U.S. at 122.

opposed to residential lines). Consistent with the *TRRO* discussion, the FCC Rule makes clear that the Business Line definition does not include **all** lines, but rather only those **business** lines that would provide a useful proxy for determining where significant revenue opportunities may exist. Again, the FCC made this distinction explicit in *TRRO* ¶ 93 as well as ¶ 103. *TRRO* ¶ 103 states as follows:

> **Business line density** also is an administrable proxy for determining where significant revenues are available sufficient for competitors to deploy transport facilities, despite the fixed and sunk costs of deployment. ... Further, **business lines are a more accurate predictor than total lines because transport deployment largely has been driven by the high bandwidth and service demands of businesses**, particularly in areas where business locations are highly concentrated. (emphasis added.)

The FCC specifically utilized the count of Business Lines as a factor for determining where CLECs are no longer impaired without access to certain unbundled network elements ("UNEs"). But, why?

As discussed above, the FCC answered the "why" question within the *TRRO*. *TRRO* ¶ 43 notes the "correlation between the number of business lines and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served via that wire center."

The second sentence in the definition identifies those categorizes of lines served by ILECs and CLECs that are candidates for meeting the Business Line criteria. It makes clear that "incumbent LEC switched access lines" qualify. For purposes of counting leased loops, the FCC looked to "the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." *TRRO ¶ 105.*

The third sentence of the Business Line definition, which is tied to the second sentence by the language used, addresses what may and may not be included in "business line tallies" when applying the second sentence. More specifically, "Among these requirements" as they are contained in the second sentence, a valid count must meet the following: (1) The Business Line count must include only those lines connecting end-users to ILEC end-offices for "switched services." (2) The business line count "shall not include non-switched special access lines." And, (3) when accounting for ISDN and other digital access lines, ILECs count "each 64 kbps-equivalent as one **line**." (as opposed to one **Business Line**).

The Fifth Circuit Court erred by decoupling the second and third sentences. The FCC explicitly tied the categories of the prior sentence to the criteria of the following one. The failure to apply the explicit criteria led the Fifth Circuit Court to its erroneous conclusions.

The fourth sentence includes an example showing how the lines would be counted if all of the requirements in the third sentence are met, i.e. whether a 64 kbps equivalent "line" constitutes a Business Line, rather than a "line" that would not be

counted, depends on whether that line satisfies the evaluative criteria of the FCC's definition. This example shows that if all 24 of the 64 kbps-equivalent lines on an ILEC DS1 line (1) are connected to an end-user business customer, (2) are providing switched services, and (3) are provided by either the ILEC or a CLEC leasing a UNE loop, then, applying the third requirement to each of the 24 lines, the DS1 line will have 24 Business Lines pursuant to the FCC's definition because each of those 24 "lines" independently meet the evaluative criteria of the Rule.

Instead of applying the Rule as a whole, the Fifth Circuit Court fell into the trap espoused by SBC/AT&T. In particular, the Fifth Circuit Court accepted the "UNE Loop" reference in the second sentence out of context in spite of the fact that the FCC explicitly stated that the requirements of the second sentence must be read "[a]mong the requirements" of the third sentence. Second, the Fifth Circuit Court ignored the explicit distinction the FCC made at the end of the third sentence of the Rule where the Rule distinguishes between "each 64 kbps-equivalent as one **line**", not one **Business Line**. Third, the Fifth Circuit Court accepted the premise that the exemplar contained in the fourth sentence could be read outside of the substantive requirements listed in the three sentences above.

The distortion to the Business Line count is even greater in the context of the phantom business lines that would be counted on higher capacity circuits. Because the Circuit Court's opinion leaves in place the PUCT's orders authorizing SBC/AT&T to count all digital loops (*e.g.*, ISDN, DS1, DS3) at their maximum potential capacity, whether or not the loop is used to

provide any switched access services, SBC/AT&T is counting lines that do not provide switched access service as Business Lines. Indeed, the lines may not provide any service at all.

The record below demonstrated that these are not insignificant in their affect as the Business Line tallies will be inflated in excess of 25% in some wire centers above what the FCC Rule requires and allows.

III. Contrasting Applications of the FCC's Rule

The Court of Appeals' interpretation of 47 C.F.R. § 51.5 is in conflict with a number of extensive opinions interpreting the rule and applying the Business Line definition. For example, one jurisdiction found:

> The Commission is further convinced by the first sentence of the business line rule, Rule 51.5 which specifically states that a business line is an incumbent LEC-owned switched access line **used to serve a business customer**. (emphasis in the original). *In the Matter of Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes in Law*, North Carolina Utilities Commission - Docket No. P-55, SUB 1549, Order Concerning Changes in Law, 2006 WL 995866 (N. Car. Utils. Comm'n, Mar. 1, 2006) (*North Carolina TRRO Order*) at 67-68.

The North Carolina Commission further addressed the argument SBC/AT&T now makes that somehow "unused" capacity is a sign of potential business revenues. As that Commission stated:

> the actual use of lines by actual customers is the business opportunity available in a wire center, not simply the maximum capacity available to serve additional customers if additional customers are not seeking to be served. *North Carolina TRRO Order* at 68.
>
> ...
>
> Therefore, the Commission concludes that it is inappropriate for BellSouth to expand its count of high-capacity UNE-L to count full system capacity. Instead, BellSouth should use the same utilization factor for CLP [CLEC] high-capacity UNE-L as exists for BellSouth's high-capacity lines. *North Carolina TRRO Order* at 69.

Similarly, the Oregon commission, after reviewing the analysis of multiple state commissions, held:

> We agree with the comments of the North Carolina Commission that a simple reading of the phrase "used to serve" precludes counting spare – i.e. unused – capacity either in individual lines or equivalents. This interpretation is not only reasonable, it most closely reflects current, real world circumstances and is most consistent with our policy of promoting robust competition in the offering of telecommunications services to the public." *Oregon TRRO Order* at 9.

Although there was a subsequent financial settlement by the parties in Oregon, likely forestalling the opportunity for the federal courts in that circuit to weigh in, nothing in the subsequent approval of a

settlement agreement changed that commission's substantive analysis.

It would be incorrect, however, to leave the impression that the ruling of the United States Circuit Court for the Fifth Circuit is alone. There continues to be a split of opinion on the application of the FCC's Business Line definition. The greater number of states have ruled similarly to the Fifth Circuit Court. What is worth noting is the difference in approach between those jurisdictions that agree with the opinion of the Fifth Circuit Court and those that agree with Logix. Almost without exception, the decisions that apply a full and detailed review of the FCC's Rule to give meaning to the entirety of the Rule come to the same conclusion as Petitioner Logix, i.e. that to be counted as a Business Line a line must be used to serve a business customer with switched services. The most extensive discussion was in the *Oklahoma TRRO Report* of the Arbitrator. In that report, the Arbitrator included a detailed, thirteen (13) page discussion of the Rule. That discussion follows a complete review of the Rule to reach the same conclusions that Logix explained in its appeal. The Arbitrator first stated that that rules of construction require "that the definition of 'business lines' should be read in its entirety, when determining the method for counting business lines within a wire center." Based in that review, the Arbitrator determined that: "The count of Business Lines should NOT include residential lines served by CLECs using UNE loops." And, "[t]he count of Business Lines should NOT include capacity on high speed digital access lines that is not being used to supply switched access services to business customers."

In contrast, the PUCT's Order Approving Methodology, which is included in the appendix, is cursory on these issues and lacks the thoroughness and completeness of the discussion one would expect and that is contained in the examples from North Carolina, Oregon, and Oklahoma.

In *Covad Communications Company v. FCC, 450 F.3d 528 (D.C. Cir. 2006)*, United States Circuit Court for the District of Columbia upheld the FCC's Rules and *TRRO*. In its opinion, that court provided a more general overview of the mechanics of the FCC's revised impairment test. When explaining the Business line definition in 47 C.F.R. § 51.5, that court applied the commonsense reading of the rule to explain that "[a] business line is a loop that runs from the wire center to a business customer." *Id. at 534*. The opinion from the Fifth Circuit Court, on the other hand, concluded that residential lines can also be counted as a Business Line when the residential customer obtains service from a competitor over a UNE loop.

Although there are a starkly conflicting decisions on how to apply the FCC's Rule for counting a Business Line, the conflict among the circuit courts is limited to the Fifth Circuit Court and the one reference by the D.C. Circuit Court. No other state commission arbitration has reached a Federal Circuit Court. In North Carolina, for example, the decision to apply the full language of the FCC's Rule to conclude that the Business Line definition only allows lines used to serve business customers with switched services to be counted was not appealed by AT&T's BellSouth affiliate. As such, the federal courts in that circuit were not given the opportunity to affirm or reverse the North Carolina decision. Whether the decision to accept the North

Carolina ruling while fighting that interpretation in other states was part of a strategic gamesmanship or based on another purpose, the result is that the conflicting application of federal law will continue unless this Court accepts jurisdiction of the issue in order to resolve the on going conflict.

This Court should resolve the confusion that has arisen in this application of federal law over just what the federal regulation requires so that the transitional scheme created by Congress in the FTA is applied as intended and uniformly.

IV. Unused Capacity Does not Serve a Customer with a Telecommunications Service

Congress has previously distinguished what is a "telecommunications service" and what is not. 47 C.F.R. § 51.5 defines a "telecommunications service" as:

> "the *offering of telecommunications for a fee* directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." (emphasis added).

Unused capacity is not a Business Line as explained in the section above. Moreover, and as the commissions in North Carolina and Oregon articulated, unused capacity cannot even be said to be used to serve the end user with a telecommunications service of any kind. The carrier does not serve the customer with telecommunications where capacity is not purchased. As the FCC's definition of a "telecommunications service" requires, unused capacity cannot be said to provide any telecommunications service at all.

The Court of Appeals acceptance of the PUCT's interpretation in this de novo appeal was mistaken.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 06-51697

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOGIX COMMUNICATIONS, L.P., Doing Business as Logix Communications, Plaintiff-Appellant,

v.

THE PUBLIC UTILITY COMMISSION OF TEXAS, PAUL HUDSON, in His Official Capacity as Chairman of the Public Utility Commission of Texas, JULIE CAURTHERS PARSLEY, in Her Official Capacity as Commissioner of the Public Utility Commission of Texas, BARRY SMITHERMAN, in His Official Capacity as Commissioner of the Public Utility Commission of Texas, Defendants-Appellees, SOUTHWESTERN BELL TELEPHONE, L.P., Doing Business as AT&T Texas, Intervenor-Plaintiff-Appellee.

March 17, 2008, Filed

JUDGES: Before REAVLEY, SMITH, and GARZA, Circuit Judges.

OPINION

JERRY E. SMITH, Circuit Judge:

On June 30, 2005, AT&T Texas ("AT&T") initiated an arbitration proceeding before the Public Utility Commission of Texas ("PUC") regarding its interconnection agreement with Logix Communications, L.P. ("Logix"), seeking post-interconnection agreement dispute resolution regarding unbundled network element ("UNE")

declassification by wire center.[1] AT&T sought to establish that its method of determining the volume of business, and thus the necessity for UNE access, in the Texas market was correct. The PUC upheld AT&T's method of counting business lines in a wire center, and Logix challenged that determination. The district court, having jurisdiction over Logix's challenge pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331, granted summary judgment for AT&T. We affirm.

I.

The Telecommunications Act of 1996 ("Act"), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 251 et seq., sought to open local telecommunication services to competition by allowing the Federal Communications Commission ("FCC") to require an ILEC to "unbundle" certain of their "network elements," such as loops, and lease them to other carriers for use in providing competing local services at substantially discounted, cost-based rates. 47 U.S.C. § 251(c)(3). In February 2005, the FCC issued the Triennial Review Remand Order ("TRRO"), 20 FCC Rcd. 2533 (2005), which addressed the scope of an ILEC's duty to provide UNE access to a competing local exchange carrier ("CLEC"), such as Logix, under the Act.

The TRRO meant to provide a metric for determining when an ILEC's failure to provide CLEC's with UNE access would impair competition. *See* 47 U.S.C. § 251(d)(2)(B). The analysis looks to the volume of business in a particular wire center to determine impairment. The theory is that when business volume reaches a certain threshold, a CLEC could make enough money in an area such that "the CLEC has the

incentive to install and operate its own fiber facilities, and thus there is no reason to require the ILEC to provide them." *Cbeyond Communs. of Tex., L.P. v. PUC of Tex.*, No. A-05-CA-862-SS, 2006 U.S. Dist. LEXIS 7381, at *6 (W.D. Tex. Jan. 24, 2006) (citing TRRO ¶¶ 93-95).

II.

Logix challenges the district court's determination that AT&T's method of counting business lines in a wire center was correct. This case concerns how to count two types of telecom lines--UNE loops and 64 kbps-equivalent, digital access lines--under the business line proxy set forth in 47 C.F.R. § 51.5. The PUC and the district court determined that all UNE loops and 64 kbps-equivalent, digital access lines count as business lines even if they do not serve business customers. We review state commission interpretations of the FCC's implementing regulations and summary judgments *de novo*. *Southwestern Bell Tel., L.P. v. PUC*, 467 F.3d 418, 421 (5th Cir. 2006).

The FCC defines a "business line" as

> an incumbent LEC-owned switched access line used to serve business customers, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to the wire center, including UNE loops provision in combination

with other unbundled elements. Among these requirements, business line tallies:

> (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
>
> (2) Shall not include non-switched special access lines,
>
> (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

47 C.F.R. § 51.5. The FCC uses this definition throughout the TRRO to establish proxies for impairment, which in turn helps show where competition is sufficient such that CLEC's have an incentive to provide their own facilities. In particular, the TRRO looks to the density of business lines:

> Business line density also is an administrable proxy for determining where significant revenues are available sufficient for competitors to deploy transport facilities, despite the fixed and sunk costs of deployment. Wire centers that possess a high level of demand for telecommunications services are most likely to attract and support competing carrier transmission facilities that duplicate the incumbent LEC's network. . . . Further, business lines are a more accurate predictor than total lines because transport deployment largely has

> been driven by the high bandwidth and service demands of business, particularly in areas where business locations are highly concentrated.

TRRO ¶ 103.

A.

Logix challenges the PUC's and the district court's determination that all UNE loops, not just those serving business customers, count as "business lines." Logix argues that the first line of the business line definition limits the remainder of the definition such that: (1) only business (as opposed to residential) lines are counted; (2) the line must be a switched access line; and (3) whether the line should be counted is not affected by whether the services are provided by an ILEC or a CLEC leasing the line.

The remainder of the definition, according to Logix, is an elaboration of the first sentence and must comport with those three criteria. Logix claims the second sentence in the definition identifies which lines served by ILEC's and CLEC's should be candidates for meeting the business line criteria and clarifies that "incumbent LEC switched access lines" qualify.

Logix's reading of the definition is against its plain meaning. The first sentence goes to the definition of a business line. The second sentence repeats the definition of the business line from the first sentence and adds to that "the sum of *all* UNE loops, including UNE loops provisioned in combination with other unbundled elements," to arrive at the number of

business lines at a wire center. 47 C.F.R. § 51.5 (emphasis added).

Only the first part of the business line count definition explicitly references serving business customers. The next clause, concerning UNE loops, makes no reference to businesses. The FCC knew how to demarcate lines used to serve businesses and did not do so in the case of UNE loops. The plain meaning of the business line count definition is that the number of business lines in a wire center is equal to the number of previously defined business lines in that center *plus* all UNE loops, even if those loops do not serve a business customer.

Logix next contends that, aside from the plain language, its reading most comports with the policy expressed in the TRRO. In particular, it reasons that the FCC understood that it was the higher revenue characteristic of business lines that made them appropriate to be counted in the impairment analysis for high-capacity loops and interoffice transport. This is a correct expression of the policy, but it ultimately provides no support for Logix's position.

As quoted above, the TRRO looks to business line density as a proxy for determining impairment, in the process distinguishing the number of business lines from the number of total lines. This does not mean that the TRRO is in conflict with § 51.5, much less that it evidences a different policy.

AT&T and the PUC have persuasive responses to Logix's policy arguments. AT&T points out that the FCC counted all UNE loops when it formulated the rules. The PUC argues that counting all UNE loops

regardless of the identity of the customer best comports with the goal of fostering competition, because it is the method used by the FCC itself to determine when impairment had been overcome to such a degree that CLEC's no longer need special unbundling agreements.

The FCC established various criteria to determine whether impairment existed at a wire center and thus whether unbundling would be required there. The number of business lines available at a wire center formed, in part, the basis for the thresholds established in 47 C.F.R. § 51.319. As the TRRO states, the "wire center data we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops." TRRO ¶ 105. If the FCC counted all UNE loops, and not just those serving business customers, in coming to its conclusions about business line count thresholds for wire centers, it would make sense to use that same data in the real world. Therefore, when the FCC speaks, in the TRRO, of business line counts in respect of those lines serving as a proxy for impairment, it is referring to the "business line count" methodology of the business line definition.

The PUC argues that the reading advanced by Logix, that only UNE loops that served business customers should be counted as business lines, fails because it requires the count to be based on competitor-provided data that the FCC expressly rejected as a basis for the business line proxy in the TRRO.[2]

Logix responds by pointing out that AT&T does collect UNE loop use data in the Midwest. Alternatively, Logix insists that instead of counting all UNE loops as

business lines, AT&T could use some objective factor to estimate how many UNE loops are being used to service business customers.

There is a problem with each suggestion. As to the former, the FCC based its impairment analysis on information already collected, not information that could be collected. And as to the latter, nowhere in the TRRO or the definition of business lines does the FCC speak of using a factor-based analysis of business line count.

The FCC goes further in its rejection of Logix's argument. Paragraphs 155-159 of the TRRO address the requisite granularity for impairment analysis. The FCC rejects building-by-building[3] analysis as that would require "collection and analysis of information that is not easily verifiable, and is often within the possession of competitive LECs." TRRO ¶ 158. Instead, the agency adopted a wire center level of granularity and looked particularly to the number of business lines in the wire center. *Id.* ¶ 155. This level of granularity was chosen even though "such a test may in some cases be under-inclusive . . . or over-inclusive." *Id.* ¶ 155. The FCC was comfortable with that, because it considered "not only actual competition within a given market, but also potential competition within that market." *Id.* ¶ 156.

Business lines were therefore chosen as easily administrable proxies for determining where significant revenue opportunities were available. The FCC chose wire centers, not commercial buildings, as the appropriate level of analysis. With this choice came the recognition of the imprecision of the method, but the

FCC determined that, because it was measuring potential competition in addition to actual competition, a certain level of imprecision was acceptable. It follows that "over-counting" UNE loops by including those that serve residential customers along with those that serve business customers comports not only with the text of the rule but also with the policy underlying the TRRO.

B.

Logix's second argument is that counting high capacity loops at the full digital equivalency, rather than by looking to end user of each line in the high capacity loop, is inconsistent with subpart (3) of the business line definition. *See* 47 C.F.R. § 51.5(3). In particular, Logix believes that only those lines in a high capacity loop that are (1) connected to an end-user business customer, (2) providing switched access service, and (3) provided by either the ILEC or CLEC leasing the UNE loop should be counted as business lines. Logix urges that if the FCC had wished to declare all high capacity services as Business Lines, it could have simplified the definition to say so. The FCC, however, does say so.

First, as discussed above, there is a distinction between the definition of a "business line" and the methodology of counting business lines for impairment purposes. In counting business lines, the FCC expressly chose not to look to end-users.

Second, the requirement at issue provides that "business line tallies . . . [s]hall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line." 47 C.F.R. § 51.5. The regulation

does not indicate that ILEC's or CLEC's should, for the first time, undertake building-by-building, end-user analysis. Instead, the plain language indicates that all lines in a high-capacity loop should count as business lines.

Logix argues that the illustration that follows supports its case. The illustration provides that "a DS1 line corresponds to 24 64 kbps-equivalent, and therefore to 24 'business lines.'" *Id.* Nowhere does this example require separating the 24 lines into those that serve business customers and those that do not. Instead, it seems to illustrate just the opposite result by requiring that each 64 kbps-equivalent should be counted as a separate business line without reference to its use.[4]

III.

The purpose behind the business line count methodology is impairment analysis, which aims at determining whether the market in a particular locale is robust enough to support unregulated competition. The FCC wanted to measure competition generally without the need for litigation or overly fact-based analysis. It should not be surprising that the method is not absolutely precise. Read as written, the regulation supports the PUC's interpretation.

AFFIRMED.

1A "wire center" is the central office of an incumbent local exchange carrier ("ILEC") such as AT&T; "loops" connect the "wire center" to the customer's premises. DS1's and DS3's are high-capacity facilities, each of which has the capacity to carry the equivalent of many

individual voice-grade lines--in engineering terms, "64 kbps-equivalents."

2*See* TRRO ¶ 105 ("[B]usiness line counts are an objective set of data that incumbent LECs already have created for other regulatory purposes. [B]y basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds . . . .").

3The FCC explicitly discusses its method in relation to an alternative method that would count the number of commercial buildings, i.e. where business customers were. TRRO at n.441.

4The quotation marks around "business lines" at the end of the illustration also point in favor of the PUC. In common usage, quotation marks may be used ironically. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1868 (1986). Irony is sometimes used to "remov[e] the semantic security of 'one signifier: one signified.'" LISA HUTCHEON, IRONY'S EDGE: THE THEORY AND POLITICS OF IRONY 13 (1994). In other words, to use quotation marks as they are used in the definition is a method of referring to something, here 64 kbps-equivalents, that ordinarily would not be encapsulated in the ordinary, un-ironic use of the term "business line." Some times, a "business line" is a "switched access line used to serve business customers." For purposes of impairment analysis, however, "business lines" are all 64 kbps-equivalents in a high capacity loop.

11/06/2006

Case No. A-06-CA-548-SS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOGIX COMMUNICATIONS L.P. d/b/a Logix Communications,
Plaintiff,
-vs-
THE PUBLIC UTILITY COMMISSION OF TEXAS, et al.,
Defendants,

ORDER

BE IT REMEMBERED on the 6th day of November 2006, the Court reviewed the file in the above-styled cause, and specifically Plaintiff Logix Communications's Motion for Summary Judgment [#20] and Defendants AT&T Texas and the Public Utility Commission of Texas's Responses thereto [#21, #22]. Having reviewed the motion and responses, the case file as a whole, and the applicable law, the Court is of the opinion that the decision of the Public Utility Commission of Texas in Docket No. 31303 should be upheld for the reasons set forth below.

Background

The Federal Telecommunications Act of 1996, Pub. L. No.104-104,110 Stat. 56, codified at 47 U.S.C. § 251 et seq., seeks to create a more competitive telecommunications market by (among other things) requiring incumbent local exchange carriers ("ILECs")

to provide their competitors ("CLECs") access to certain elements of the ILECs' infrastructure at substantially discounted, costbased rates in some circumstances. 47 U.S.C. § 251 (c)(3), The term used in the industry to describe such a piece of the network is "unbundled network element" or "UNE." The Federal Communications Commission ("FCC") has promulgated rules to determine when access to UNEs should be provided. 47 C.F.R. §51.1 et seq. These rules are explained in the FCC's Triennial Review Remand Order, 20 FCC Rcd. 2533 (2005). In essence, the FCC requires ILECs to provide CLECs access to UNEs when failure to do so would impair competition.

See 47 U.S.C. § 251 (d)(2)(B). This "impairment analysis" is "based on the volume of business being done in a particular area." Cbeyond Communications L. P. v. Pub. Util. Comm'n., No. A-05-CA-862-SS (W.D. Tex. Jan. 24 2006. In theory, if the volume of business in an area is high, "the CLEC has the incentive to install and operate its own fiber facilities, and thus; there is no reason to require the ILEC to provide them." Id.

Under section 252 of the Federal Telecommunications Act ("FTA"), ILECs are obligated to negotiate interconnection agreements with CLECs regarding the use of ILEC infrastructure. 47 U.S.C. § 252(a). Any party to such negotiations may compel arbitration before a state utilities commission. Id. at § 252(b). The parties may appeal the state commission's decisions to a federal district court, Id. at § 252(e)(6), which will review the FTA issues de novo. Southwestern Bell Tel. Co. v. Pub. Util. Comm'n, 208 F.3d 475, 482 (5th Cir. 2000).

On June 30, 2005, AT&T Texas ("AT&T") initiated an arbitration proceeding before the Public Utility Commission of Texas ("PUCT") regarding its interconnection agreement with Logix Communications ("Logix"), "seeking "post-interconnection agreement dispute resolution regarding unbundled netowork elements ("UNE") declassification by wire center." Compl. Par. 13. AT&T sought to establish that its method for determining the volume of business, and thus the necessity for UNE access, in the Texas market is correct. Logix now appeals the PUCT's decision in that case.

Logix raises two issues on appeal; (1) In determining the number of "business lines" at a particular wire center, should the count include all UNE Loops connected to that wire center, or only the UNE Loops that can be shown to serve business clients? Logix contends the Commission erred in holding that all UNE Loops should be counted. (2) In determining the number of "business lines" at a particular wire center, should each 64-kbps-equivalent in a high capacity loop be counted as one business line, or should the count be limited to the capacity actually used to serve business customers? Logix contends the Commission erred in holding that actual use is irrelevant and each 64-kbps-equivalent should count as one business line.

Analysis

The dispute in thus case centers around the proper interpretation of FCC Rule 51.5, concerning the regulatory definition of a "business line." 47 C.F.R. § 51.5. The number of business lines in a wire center is used to establish the thresholds at which market

competition is considered "impaired" for purposes of UNE access. 47 C.F.R. § 51.319(a)(4)-(5). The rule states in relevant part,

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies;
> (l) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
> (2) Shall not include- non-switched special access lines,
> (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

Id.

The FCC, by the plain language of this rule, has determined that "[t]he number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center." 47 C.F.R. § 51,5. Logix contends this language is qualified by the phrase that precedes it; "A business line is an incumbent LEC-

owned switched access line used to serve a business customer." Id. Therefore, Logix argues, the phrase "all UNE loops connected to that wire center" must be read to include only the UNE Loops that can be shown to serve business clients.

This argument fails to consider the simple fact that the rule identifies the number of business lines in a wire center as "the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center." This grammatical structure indicates the FCC wished to include only business switched-access lines, but wished to count all UNE loops. This interpretation is further supported by the next clause in the sentence; "the sum of all incumbent LEC business switched access lines, plus the sum .of all UNE loops connected to that wire center, including. UNE loops provisioned in combination with other unbundled elements." The FCC explicitly intended to count all UNE loops, not just those "provisioned, in combination with" business lines.

This reading of the rule is further supported by the FCC's Triennial Review Remand Order. 20 FCC Rcd. 2533. The FCC has explained that it relies on data available from the preexisting FCC filings required of incumbents in determining how to establish the number of business lines in a wire center. Triennial Review Remand Order, 20 FCC Red. 2533 at Par. 105. The FCC specifically chose this approach to avoid the problems inherent in its previously-overturned unbundling rules. See US. Telecom. Assn v. FCC, 359 F.3d 544,573-74 (D.C. Cir. 2004). In US. Telecom, the D.C. Circuit limited the FCC's ability to "subdelegate" the evaluation of subjective impairment criteria to state

authorities, and also directed the Commission to consider in its impairment evaluation not only actual competition within a given market but also potential competition in that market, Id.; see also Triennial Review Remand Order, 20 FCC Rcd. 2533 at Par. 156. The FCC reasoned that "these two directives effectively preclude our reliance on a building-specific approach" to the impairment analysis. Id. A case-by-case evaluation of impairment would be impracticable for two reasons: first, much of the more detailed data on competitive use is solely in the possession of CLECs, who "may (1) have no interest in the outcome of the analysis, and thus little incentive to provide the relevant information, or (2) desire to retain unbundling within the building...and thus would have...an explicit incentive to avoid cooperating." Id. at Par. 158, n.442. Second, the evaluation of that data would be unreasonably subjective. "Even if these factors could be reasonably enumerated, it is inevitable that incumbent LECs and competitive LECs would engage in disputes over many of them, building-by-building, raising the prospect of expensive, fact-intensive litigation for years to come." Id. at Par. 159.

Therefore, the FCC "conclude[d] that such detailed and potentially subjective building-by-building and loop-by-loop evaluations ... are not practical." Id. Instead, the FCC chose to base its business line count on data established by objective ILEC filings, reasoning that "by basing our definition [of business line counts] in an ARMIS filing required of incumbent LEGS, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information." Id. at Par. 105. The ARMIS and UNE figures are not

only "objective and readily available," id, at Par. 161, but are also good indicators of both actual and potential competition in a given market, because the existence of the fiber facilities reported in these filings is "the factor that most prominently determines whether construction, of a competitive facility is economic." Id.

The approach advocated by Logix would require the exact loop-by-loop analysis rejected in the FCC.'s Order. Logix argues only UNE loops serving business customers should be counted in the business line tally, but this information is not readily available to or verifiable by the FCC. ILECs do not generally report or even have information on how CLECs use their UNE loops. Thus, this is exactly the type of information the FCC found impractical: it is "not easily verifiable, and is often exclusively within the possession of competitive LECs, many of which have little incentive to provide that information to regulators evaluating impairment." Id at Par. 158.

Logix points to this Court's decision in Cbeyond Communications L.P. v. Pub. MI., Comm'n., arguing that notwithstanding the analysis explained in the FCC's Order, the intent - expressed in the order must yield to the unambiguous language of the final regulation. No. A-05CA-862-SS (W.D. Tex., Jan. 24, 2006). Cbeyond concerned an FCC regulation that was "facially irreconcilable" with the text of the Triennial Review Remand Order. Id. In that situation, this Court held that "when the FCC makes inconsistent statements in an order and a regulation, it is the language in the regulation-not the order that is controlling." Id. The regulation and order at issue today are not irreconcilable; the order explains and

supports the plain meaning of the regulation. Therefore, the PUCT's decision that all UNE loops in a wire center should be. counted to establish the number of business lines in that wire center is correct.

Logix raises essentially the same textual argument in asserting that the rule's requirement that business line tallies "(3) [s]hall account for ISDN and other digital access lines by counting each 64 kbps-equivalent, as one line" is properly limited to 64 kbps-equivalents actually used by business customers. This argument is without merit. The sentence itself is unqualified and suggests no exceptions or limitations. Moreover, as explained above, data on actual end use is not readily verifiable by the FCC, nor is it objective: The FCC has rejected such a detailed approach, recognizing that "although it may provide a more complete picture," the evaluation of such data would be unworkable. Triennial Review Remand Order at Par. 105. The PUCT's holding that each 64 kbps-equivalent shall be counted as one business line is supported by both the text of the regulation and the intent expressed in the Triennial Review Remand Order.

Conclusion.

In accordance with the foregoing,

IT IS ORDERED that Plaintiff Logix Communications' Motion for Summary Judgment [#20] is DENIED.

IT IS FURTHER ORDERED that summary judgment in favor of Defendants IS GRANTED. IT IS FINALLY ORDERED that any remaining motions in this case are DISMISSED AS MOOT.

SIGNED this the 6th day of November 2006.

Filed 11/16/2006
Case No. A-06-CA-548-SS
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOGIX COMMUNICATIONS L.P. d/b/a Logix Communications,
Plaintiff,
-vs-
THE PUBLIC UTILITY COMMISSION OF TEXAS, et al.,
Defendants,

ORDER

BE IT REMEMBERED on the 15th day of November 2006, the Court reviewed the file in the above-styled cause, specifically Plaintiff's Motion to Alter Judgment or Reconsider and Vacate Judgment [#25].

On November 6, 2006, this Court granted summary judgment in favor of Defendants after considering Plaintiff's Motion for Summary Judgment and Defendants' Responses thereto. In reaching this decision, the Court carefully reviewed a voluminous record, The Plaintiffs, in support of the motion, entered over one hundred pages of exhibits, including everything from . testimony before the Public Utility Commission to pages from the American College Dictionary. Each Defendant was equally thorough in response.

Nonetheless, Plaintiff maintains this decision was entered on an incomplete record, because the Court

entered judgment before Plaintiff filed a reply to the Defendants' responses. Under the Local Rules, responsive pleadings are normally due ten days after the pleading to which they respond. The Court, however, entered a Scheduling Order in this case allowing Plaintiff to file a reply no later than November 10, 2006, one full month after Defendants' responses were due. The Court overlooked this order when it entered summary judgment in favor of defendants on November 6, 2006, four days before the due date for a reply. This was an error on the Court's part, which Plaintiff now seeks to correct by filing this Motion to Alter Judgment or Reconsider and Vacate Judgment.

"The motion to reconsider is found nowhere in the Federal Rules of Civil Procedure." Beijing Sansheng Dev. Corp. v. Advertisement Tech, Corp., SA-01-CA-0522 NN, 2005 U.S. Dist. LEXIS 8529 (W.D. Tex. 2005) (quoting State of Lousianna v. Sprint Commc'ns Co., 899 F. Supp. 282, 284 (M.D. La. 1995)). In the interests of justice, however, most courts allow motions to reconsider in one form or another. Id (citing Fed. R. Civ. P. 8(f)). Here, Plaintiff asks the Court to alter or vacate its judgment pursuant to Fed. R. Civ. P. 59(e), which allows a court to amend its judgment within,ten days of entry. There are only three grounds for granting a Rule 59(e) motion: "(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or prevent manifest injustice." In re Benjamin Moore & Co., 318 F.3d 626, 629 (5th Cir. 2002). Thus, although the Court regrets the inconvenience to, the parties, Plaintiff is not relieved of its burden to show the Court's clear error in. scheduling is also a clear error of. law. "[R]ulings should only be

reconsidered where the moving party has presented substantial reasons for reconsideration." Sprint Commc'ns Co., 899 F. Supp. at 284.

Plaintiff argues the Court's premature entry of judgment prevented Plaintiff from completing the appellate record, because Plaintiff relied on the Court's representation that it would have the opportunity to supplement the record in a reply brief. Specifically, Plaintiff would have entered further PUCT hearing testimony and an exerpt from a favorable decision of the North Carolina Utilities Commission in a similar case in support of its reply. The Court notes that these documents are now part of the record as exhibits attached to Plaintiff s motion for reconsideration. The Court further notes that "litigants are expected to present their strongest case- when the matter is first considered." Texas Instruments, 50 F. Supp. 2d at 621 (quoting Sprint Commc'ns, 899 F. Supp. at 284). Nevertheless, in the interests of justice, the Court will consider the merits of Plaintiffs reply brief and exhibits in support thereof.

The Court is unconvinced by these materials: Plaintiffs reply simply reurges the arguments presented in its motion for summary judgment. The exhibits support this vigorously presented argument, but they do not shed new light on the issue. In particular, although the reasoning of the North Carolina Utilities Commission, presented in support of Plaintiffs reply, is well articulated, it is not binding on this Court. The Court is persuaded, instead, by the reasoning of the Alabama, California, Florida, Georgia, Illinois, Indiana, Kansas, South Carolina, Ohio, Utah, and Washington, D.C. utilities commissions, which this Court followed in its

November 6th, 2006 summary judgment order.

Plaintiff alleges two other "clear errors" in the Court's November 6, ruling. First, Plaintiff asserts the Court erroneously interpreted the FCC rule defining a business line: Plaintiff is simply repeating the arguments expounded at length in its earlier filings. "Motions to reconsider 'based on recycled arguments only [serve] to waste the resources of the court,"' Texas Instruments, Inc. v. Hyundai Elec. Indus., Co., 50 F. Supp. 2d 619, 621(E.D. Tex. 1997) (quoting Sprint Commc'ns, 899 F. Supp. at 284: Plaintiff's second argument, that this Court's ruling in Cbeyond v. Public Util Comm. of Texas, No. A-05-CA-862-SS (January 24, 2006) dictates Plaintiff's desired result in this case; is likewise stale. This Court carefully considered both of Plaintiff's arguments based on the able and detailed flings of all the parties in its November 6th, 2006 summary judgment order. Motions to reconsider "are not the proper vehicle to `[rehash] old arguments,"' Texas Instruments, 50 F. Supp. 2d at 621 (quoting Resolution Trust Corp. v. Holmes, 846 F. Supp.1310,1316 (S.D. Tex. 1994)). Because Plaintiff has failed to establish the Court's November 6, 2006 judgment contained a clear error of law, the motion for reconsideration must be denied.

In accordance with the foregoing,

IT IS ORDERED that Plaintiff's Motion to Alter the Judgment or Reconsider and Vacate Judgment [#25] is DENIED.

IT IS FURTHER ORDERED that all other pending motions in the above-styled case are DISMISSED AS MOOT.

Excerpts 4/7/2006
PUC DOCKET NO. 31303
PUBLIC UTILITY COMMISSION OF TEXAS

POST-INTERCONNECTION DISPUTE RESOLUTION PROCEEDING REGARDING WIRE CENTER UNE DECLASSIFICATION, ORDER APPROVING METHODOLOGY TO DETERMINE AT&T TEXAS WIRE CENTERS WHICH ARE NON-IMPAIRED

***

Commission's Decision

The Commission finds that AT&T Texas's methods and procedures for identifying a fiber-based collocator outlined in its Bench Request[103] responses and its briefs are generally adequate. However, the Commission does agree with the Joint CLECs assertion that AT&T Texas's decision not to provide written methods and procedures to its personnel who personned the actual counting prevents AT&T Texas's data from having the degree of reliability necessary for the Commission to make a determination. Accordingly, the Commission finds that AT&T Texas must provide the following information: written methods and procedures given to the network personnel responsible for the physical inspections, the name and title of the personnel conducting the physical inspections, written methods and procedures given to the Industry Markets in applying the affiliate relationships standards, and a list of all fiber-based collocators and any affiliate relationship that may exist between those fiber-based collocators.

Issue 2

For purposes of the 47 C.F.H. § 51.5 definition of "business line":

A.How should UNE loops be counted under the TRRO and rules?

Joint CLECs' Position

The Joint CLECs cite the FCC's definition of business line as follows.[104]

> Business Line. A business line is an incumbent LEC-owned switched access line used to service a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switches access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among those requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting 64 kbps-equivalent as one line. For example, DS1 line corresponds to 24 64 kbpsequivalents, and therefore to 24 "business lines."

According to the Joint CLECS, the most important

A part of understanding and applying the above definition is recognizing that all four sentences must be read together and applied in a manner that is internally consistent.[105] According to the Joint CLECS, each sentence of the definition is important so that in order to be counted, a business line must satisfy each requirement of the definition.[106]

The Joint CLECS maintain that the fast sentence in the rule establishes two conditions: (1) that only business lines are to be counted, and (2) whether a line is counted should not be affected by whether it is serviced by a CLEC leasing the loop from AT&T Texas or by AT&T Texas itself. According to the Joint CLECS, the definition then goes on to indicate the types of loops that are candidates to be counted if the elements of the definition are satisfied.

The Joint CLECS assert that AT&T Texas's methodology for counting business lines violates the requisite criteria specifically by including: (1) residential lines service by CLECS using UNE loops; and (2) capacity on high-speed digital access lines leased to CLECS that is unused or used for data services. [107]

According to the Joint CLECS, UNE loops must be counted in a manner that complies with the full FCC definition, which means that a UNE loop must be used to: (1) service a business customer; (2) provide switched services; and, to the extent consistent with these requirements, (3) each 64 kbps channel should be counted as one line.[108] The Joint CLECs contend that whether a line is counted as a business line should not depend on whether the customer is served by AT&T

Texas or the CLEC.[109] A UNE loop would be counted as a business line if AT&T Texas reported the UNE loop as a business line in ARMIS 43-08, which is the source for AT&T Texas' retail line count and if the very same arrangement had connected to AT&T Texas's switch instead of the CLEC's.[110]

The Joint CLECs disagree that AT&T Texas should count all UNE loops as business lines without regard to whether the lines satisfy any requirements to be considered a business line. [111]

ATT Texas's Position

AT&T Texas asserts that the methodology it used to count business switched access lines is correct and complies with the FCC's instructions set forth in the TRRO.[112] AT&T Texas relies on the same FCC definition of business line used by the Joint CLECs.[113] AT&T Texas claims it took two basic steps to calculate the line count for each applicable wire center. First, AT&T Texas calculated the total number of business switched access lines it services using the data underlying its December 2003 ARMIS 43-08 report which according to AT&T Texas was the most recent report on file with the FCC as of the effective date of the TRRO.[114] Second, AT&T Texas calculated the total number of UNE loops and the total number of business UNE-P lines leased to CLECs from AT&T Texas as of December 2003. This date is consistent with the data used in the most recent ARMIS report.[115]

AT&T Texas notes, with respect to determining high capacity UNE loop and dedicated interoffice transport non-impairment, that the FCC specifically explained

that: [116]

> [A]s we define them, business line counts are an objective set of data that incumbent LECs already have to create for other regulatory purposes. The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus UNE-P, and UNE loops, we adopt this definition of business lines because it fairly represents the business opportunities in a wire center, including business opportunities already captured by competing carriers through the use of UNEs. Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify. Conversely, by basing our definition on an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information.

AT&T Texas indicates that it used the methodology the FCC established for determination of line counts for the ARMIS 43-08 report, which ensured that only business switched access lines connecting end user customer with ILEC end-office for switched services were counted and that PBX trunks, Centrex lines, and ISDN lines were counted as required by the FCC, The methodology ensured that non-switched access lines were not included in the business line counts, [117] AT&T Texas bases its business line counts on ARMIS 43-08

business line data, UNE-P business line counts, and UNE loop counts using the same definition, that was used when AT&T Texas provided the data that'the FCC used for its analysis. [118]

AT&T Texas disagrees with the Joint CLECs' assertion that it is necessary to determine which UNE loops CLECs are using to provide business service to an end user customer.[119] AT&T Texas argues that the FCC has concluded that business line counts are an objective set of data the incumbent LECs already have created for other regulatory purposes.[120] Moreover, AT&T Texas does not maintain records indicating whether each UNE loop is used to serve a business customer. [121]

AT&T Texas also notes that the FCC's impairment determinations were made on national basis based on the data that all of the ILECs provided. AT&T Texas states that the definition of a business line that the FCC established was based on this same information. If the Commission were to adopt a different definition of business lines as some CLECs have proposed, AT&T Texas asserts that the FCC's impairment analysis would need to reflect the change and logically the number of business lines required to meet the thresholds would need to be reduced. [122]

Commission's Decision

The Commission finds that the method used by AT&T Texas for determining business line counts is consistent with the FCC's instructions for reporting business line counts for ILEC wire centers. The Commission notes that Par. 105 of the TRRO states:

> Moreover, as we define them, business line counts are an objective set of data that incumbent LECs already have created for other regulatory purposes, The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE loops. We adopt this definition of business lines because it fairly represents the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs, Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify. Conversely, by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information.

The Commission finds that AT&T Texas' determination, counting, and reporting of business lines for its wire centers is consistent with the FCC's directive at Par. 105 of the TRRO.

Further, the Commission is not persuaded by the Joint CLEC's assertion that a further examination regarding the type of customer being served by UNE loops is required, since that requirement would go beyond the FCC's directive in Par. 105 of the TRRO. The Commission notes that the FCC indicated that when

counting business lines the ILEC should include ARMIS 43-08 business lines (i.e. business line service for ILEC customers), plus UNE-P business lines (i.e. business lines service by CLEC customers using UNE-P), plus UNE loops. The Commission is persuaded that if the FCC intended that only UNE loops serving business customers should be counted, it would have stated this in Par. 105 of the TRRO.

B. What is the proper methodology for ILECs to employ to assure that only UNE-L capacity used to provide switched services (as opposed to non-switched services) was included in determining the business line count for each wire center?

Joint CLECs' Position

The Joint CLECs support the use of a good faith estimate to remove UNE Loop capacity used to provide residential services, empty capacity, and capacity used for data services. [123] The Joint CLECs recommend that AT&T Texas be required to refile its proposed wire center classifications based on 2005 data, with adjustments made to remove UNE loop arrangements not used to provide switched business line services.

The Joint CLECs argue that the FCC's definition of a business line does not require all UNE loops, much less every 64 kbps channel, to be counted as a business line whether or not they otherwise meet the requirements of the definition. [124] Moreover, according to the Joint CLECs, AT&T Texas is incorrect in counting every DS1 loop by its maximum potential capacity (i.e., as 24 business lines).[125] The Joint CLECs assert that AT&T Texas appears to base its view that every 64 kbps

channel should be counted at its maximum potential on its selective reading of the FCC's final instruction, which indicates that the business line count: "...shall account for ISDN and other digital access line by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 business lines." [126] According to the Joint CLECs, this portion of the FCC's final instruction is critical because it requires AT&T Texas to account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line.[127] According to the Joint CLECs however, this does nothing more than what it plainly states, i.e., that each 64 kbps-equivalent should be consider one line.[128] The Joint CLECs assert that whether each line should count as a business line depends upon whether the remaining criteria of the business definition are satisfied.[129]

According to the Joint CLECs, the fact that the above referenced definition provides an example of how the analysis might count a DS1 is not the same as defining all DS1 s as 24 business lines. [130] The Joint CLECs aver that had the FCC intended to include all high capacity services in the definition of business lines, it could have done so, but did not. [131] The Joint CLECs contend that this instruction directed that each 64-kbps equivalent be considered one line, and then directed that other criteria -- most specifically, that the line be used to provide switched access line service to a business customer - determine whether each line should be considered a business line. [132]

The Joint CLECs claim that ensuring that the FCC's full definition is applied requires a good faith estimate

to remove UNE loop capacity used to provide residential services, empty capacity, and capacity used for data services. [133] The Joint CLECs recommend that AT&T Texas be required to re-file its proposed wire center classifications based on 2005 data, with adjustments made to remove UNE loop arrangements not used to provide switched business line services. The Joint CLECs argue that such adjustments can be made through the application of a reasonable estimation methodology. [134]

AT&T Texas's Position

According to AT&T Texas, both the ARMIS 43-08 rules and the FCC's business line definition require that digital access. lines be calculated by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore 24 business lines,[135] According to AT&T Texas, this same approach applies to UNE lines and non-UNE lines. [136]

AT&T Texas notes that its Texas records indicate the bandwidth of the digital loop it provides a CLEC, but that AT&T Texas does not know the full bandwidth the CLEC uses of such a UNE loop. [137] Accordingly, it counted each two-wire digital UNE-L as 2 business lines, each DS1 UNE loop as 24 business lines, and each DS3 UNE loop as 672 business lines. [138]

According to AT&T Texas, in addition to the ARMIS 43-08 line counts, paragraph 105 of the TRRO and FCC Rule 51.5 require that the business line count include "the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with unbundled elements,"139 AT&T Texas asserts

that for UNE loops that are not provisioned in combination with another UNE, the TRRO requires that all lines be included in business line, counts and that this conclusion is consistent with the data the ILECs provided to the FCC as well as specific language in the TRRO.

Further, AT&T Texas notes that the information it used in its ARMIS 43-08 report is based on the services AT&T Texas provides to its retail customers. If AT&T Texas has provided a retail customer a full DS1 line, AT&T Texas will count that DS1 as 24 equivalent lines as required by the ARMIS 43-08 reporting rules. [140] AT&T Texas indicates that in those situations where it has provided a full DS1 UNE loop to a CLEC, that a DSl UNE loop is counted as 24 lines.

Commission's Decision

The 47 C.F.R. §51.5 definition of business-line is as follows:

> Business line. A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies: (1) shall include only those access lines connecting end-

> user customers with incumbent LEC end offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DSI line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

The Commission finds that AT&T Texas's counting and reporting of UNE-L capacity complies with the FCC's definition of a business line in 47 C.F.R §51.5 as well as the FCC's specific instruction on reporting such lines found in Par. 105 of the TRRO, described in Issue 1A, supra. The Commission notes that two-wire switched digital access lines have a capacity of two 64 kbps circuits, therefore, each switched two-wire switched digital line used to provide business service should be counted as two business lines as directed in 47 C.F.R. §51.5(3).

C. How should PBX trunks, Centrex lines, and ISDN and other digital access lines be counted under the TRRO rules and ARMIS rules?

Joint CLECs' Position

Consistent with their position discussed in Issue 2B above, the Joint CLECs support the use of a good faith estimate to remove UNE loop capacity used to provide residential services,

Footnotes

103 Order No. 4, September 1, 2005.
104 Direct Testimony of Joseph Gillan, Joint CLEC Ex.

l at l7.
105 1d.
106 Id. at 18.
107 Id. at 19.
108 Id 109 Id.
110. Id. at l9-20.
111 Id. at 21.
112 Direct Testimony of Thomas Sowash, ATT Texas Ex. 5 at 3.
113 Id. at 4.
114 Id..
115 Id. at 5.
116 Id. at 5 citing TRRO Par. 105.
117 Id. at 6.
118 Id. at 8-9.
119 Id. at 11.
120 Id.
121 Id. at 12.
122 Id.
123 Id. at 25.
124 Direct Testimony of Joseph Gillan, Joint CLEC Ex. 1 at 21.
125 Id.
126 Id. At 22, citing 47 CFR §51.5,
127 Id, at 22.
128 Id
129 Id.
130 Id.
131 Id.
132 Id
133 Id. at 25.
134 Id.
135 Direct Testimony of Carol Chapman, ATT Texas Ex. No. 3 at 15.
136 Id.

137 Id.
138 Id. at 15-16
139 Id. at 10.
140 Id. at 15.

No. 06-51697

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOGIX COMMUNICATIONS, L.P., Doing Business as Logix Communications, Plaintiff-Appellant,

v.

THE PUBLIC UTILITY COMMISSION OF TEXAS, PAUL HUDSON, in His Official Capacity as Chairman of the Public Utility Commission of Texas, JULIE CAURTHERS PARSLEY, in Her Official Capacity as Commissioner of the Public Utility Commission of Texas, BARRY SMITHERMAN, in His Official Capacity as Commissioner of the Public Utility Commission of Texas, Defendants-Appellees, SOUTHWESTERN BELL TELEPHONE, L.P., Doing Business as AT&T Texas, Intervenor-Plaintiff-Appellee.

April 11, 2008, Filed

Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING

JUDGES: Before REAVLEY, SMITH, and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

FILED
AUG 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-55

In the Supreme Court of the United States

LOGIX COMMUNICATIONS, L.P., DOING BUSINESS AS LOGIX COMMUNICATIONS,

Petitioner,

v.

THE PUBLIC UTILITY COMMISSION OF TEXAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT AT&T TEXAS

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QUESTIONS PRESENTED

Under the federal Telecommunications Act of 1996, incumbent local exchange carriers can be required to "unbundle" certain of their network elements by leasing them to competing carriers. The Federal Communications Commission decides which network elements must be unbundled, and under what circumstances, and state public utility commissions implement those rules. One FCC rule makes the unbundling of certain network elements turn, in part, on the number of "business lines" in the wire center where the network element is located. The Public Utility Commission of Texas issued a decision implementing that rule and the FCC's methodology for computing "business lines," agreeing with AT&T Texas' application of the FCC's rule. Petitioner appealed that decision to the district court and then the Fifth Circuit, both of which affirmed.

The questions presented are:

1. Whether the Fifth Circuit correctly determined that FCC Rule 51.5, which states that the "number of business lines in a wire center shall" include "the sum of all UNE loops," requires that all UNE loops be counted as business lines.

2. Whether the Fifth Circuit correctly determined that FCC Rule 51.5, which states that "business line tallies * * * shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line," requires that each 64 kbps-equivalent be counted as one business line.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Southwestern Bell Telephone, L.P., d/b/a AT&T Texas states the following: AT&T Texas is a wholly-owned subsidiary of AT&T Teleholdings, Inc. AT&T Teleholdings, Inc. is a wholly-owned subsidiary of AT&T Inc. AT&T Inc. is a publicly held company.

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BRIEF IN OPPOSITION OF RESPONDENT AT&T TEXAS

The FCC Rule defining "business line" states that in computing the number of business lines in an incumbent local exchange carrier's ("ILEC's") wire center, one must include "the sum of all UNE loops connected to that wire center."[1] 47 C.F.R. § 51.5. ("UNE" stands for unbundled network element.) The FCC's Rule also provides that for high-capacity digital loops, which can carry multiple voice-grade lines or "64 kbps-equivalents" at once, "each 64 kbps-equivalent" "shall" count as one business line. *Ibid.* Based on the plain language of the FCC's Rule and the FCC's explanation of the rule in its *Triennial Review Remand Order* ("*TRRO*"),[2] the Fifth Circuit concluded that Rule § 51.5 requires business line counts to include "all UNE loops" and "each" 64 kbps-equivalent on high-capacity loops.

Petitioner Logix Communications, L.P. ("Logix") now seeks certiorari, but presents no conceivable basis for review. There is no conflict among circuits, for the Fifth Circuit is the only court of appeals to have addressed this issue. There is no conflict among federal district courts, for every district court to have addressed the issue agrees with the Fifth Circuit. There is not even a conflict among state public utility commissions, for sixteen state commissions have

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[1] Generally speaking, a wire center is the geographic area served by a telephone company's local switch.

[2] Order on Remand, *In re Unbundled Access to Network Elements*, 20 FCC Rcd. 2533 (2005), *aff'd, Covad Commc'ns Corp. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

agreed with the Fifth Circuit's and the Texas Commission's approach while only one has not. Taken together, that makes the scorecard of decisions 21-1 in favor of the Fifth Circuit's and AT&T Texas' position. Moreover, a petition for reconsideration of the FCC's rule on computing "business lines" remains pending at the FCC, so even if there were any legitimate basis for disagreement over how to read the FCC's rule (which there is not), the FCC could resolve it.

The Fifth Circuit's decision also is plainly correct. FCC Rule 51.5 states that the number of "business lines" in a wire center "shall" include "the sum of all UNE loops" and "shall" count "each" 64 kbps-equivalent as one business line. There is no ambiguity in the rule and no basis for petitioner's position that the rule includes only those UNE loops and 64 kbps-equivalents that are actually being used to provide switched voice service to a business customer. The Fifth Circuit correctly interpreted the rule as written: "all" means all, "shall" means shall, and "each" means each. This reading of the rule also is consistent with the FCC's decision to rely on "an objective set of data that incumbent LECs already have created for other regulatory purposes" and that is "readily confirmable by competitors." *TRRO*, ¶¶ 104-105, 108. Incumbent LECs already provide the FCC with various reports that reflect the number of "all UNE loops" provided by the incumbent and the number of 64 kbps equivalents in the incumbent's high-capacity loops, but do not (and typically cannot) separately identify the number of UNE loops or 64 kbps-equivalents that are used to serve business customers alone.

STATEMENT OF THE CASE

The federal Telecommunications Act of 1996 ("Act" or "1996 Act") authorizes the FCC to require incumbent LECs, like AT&T Texas, to "unbundle" certain of their "network elements" and lease them to CLECs, like Logix, for use in providing competing local services. 47 U.S.C. § 251(c)(3). Types of network elements include loops (the wires that connect a customer's home or business to the incumbent LEC's local switch) and interoffice transport (cables that connect switches to one another). 47 C.F.R. §§ 51.319(a) & (e). An incumbent LEC can be required to unbundle a network element for CLECs only if the FCC finds, at a minimum, that CLECs would otherwise be "impaired" in their ability to compete with the incumbent. 47 U.S.C. § 251(d)(2). The FCC applies the "impairment" requirement to establish rules that determine whether, and under what conditions, specific network elements must be unbundled. *Ibid.*; *TRRO*, ¶¶ 20-24. The FCC's rules are then implemented and enforced by state public utility commissions. The FCC established its latest set of unbundling rules in its *TRRO* in February 2005. Those rules, including the business line rule, were upheld on appeal. *Covad Commc'ns Corp.* v. *FCC*, 450 F.3d 528, 541-546 (D.C. Cir. 2006).

With regard to an incumbent LEC's high-capacity loops and interoffice transport facilities, the FCC decided that there is no impairment, and thus no unbundling requirement, where the revenue opportunities for CLECs in a given geographic area are sufficient to enable them to deploy their own high-capacity loops and interoffice transport. *TRRO*, ¶¶ 43, 87-92, 146-156. Because there is no precise way to measure revenue opportunities, the FCC de-

cided that whether "impairment" exists in a wire center would be determined by two objective proxy measures. *Id.*, ¶¶ 87-93, 103, 167-173. These proxies are: (i) the number of "fiber-based collocators" in the wire center (which is not at issue here), and (ii) the number of "business lines" served by the wire center. *Id.*, ¶¶ 93, 167. The FCC then used these proxies to establish bright-line thresholds that determine whether incumbent LECs have to unbundle their high-capacity loops and interoffice transport. 47 C.F.R. §§ 51.319(a)(4)-(5) and (e)(2)(ii)-(iv). For example, a DS1 interoffice transport facility does not have to be unbundled if the wire centers at both ends of the cable have at least four fiber-based collocators, at least 38,000 business lines, or both. 47 C.F.R. §§ 51.319(a)(4) and (5); *TRRO*, ¶¶ 66, 146.

The FCC's definition of "business line" in Rule 51.5 provides detailed instructions for computing the number of "business lines" in a wire center. Rule 51.5 provides that "[t]he number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of *all UNE loops* connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." 47 C.F.R. § 51.5 (emphasis added). The rule also deals with how to count "business lines" on high-capacity facilities, such as DS1 and DS3 facilities. Such facilities have the capacity to carry the equivalent of many individual voice-grade lines, or, in engineering terms, "64 kbps-equivalents." A DS1, for example, can carry 24 64 kbps-equivalents. C.A. R. 21, Ex. 13 at 15. The FCC's rule states that incumbent LECs "shall account" for such loops "by counting *each* 64 kbps-equivalent" channel in the loop as one "business line": "For example, a DS1 line corresponds to 24 64

kbps-equivalents, and therefore to 24 'business lines.'" 47 C.F.R. § 51.5 (emphasis added).

Counting "all UNE loops" and "each 64 kbps-equivalent" as "business line[s]" will inevitably result in some lines being counted as "business lines" even though they do not actually serve a business customer. The FCC, however, was well aware that its rule could never be perfect and would necessarily lead to some over- or under-inclusiveness. *TRRO*, ¶¶ 88, 94, 104, 155, 169. Nevertheless, the FCC chose to adopt a rule that was easy to administer rather than seeking absolute precision. Specifically, the FCC selected its method for computing "business lines," even though it conceivably could include some lines that serve non-business customers, because it relies on "an objective set of data that incumbent LECs already have created for other regulatory purposes" and that is "readily confirmable by competitors." *Id.*, ¶¶ 105, 108. Incumbent LECs already provide the FCC with various reports that reflect the number of "all UNE loops" provided by the incumbent and the number of 64 kbps-equivalents in the incumbent's high-capacity loops. C.A. R. 21, Ex. 13 at 9, 12, 15-16 & Ex. 14 at 15. By contrast, incumbent LECs do not (and typically cannot) separately identify and report the number of UNE loops or 64 kbps-equivalents that serve business customers only. C.A. R. 21, Ex. 13 at 12-13, 15-16 & Ex. 14 at 14, 16.

Relying exclusively on reported, verifiable data allowed the FCC to be "confident in the accuracy of the thresholds" it established in its unbundling rules and to ensure a "simplified ability to obtain the necessary information" when applying the rule to specific wire centers. *TRRO*, ¶ 105. This advanced the FCC's overarching goal of making a "bright-line rule"

that was "self-effectuating" and "readily administered" by carriers and state commissions. *Id.*, ¶¶ 3, 4, 93, 105, 108, 169.

The FCC gave state public utility commissions the task of implementing the rules in the *TRRO*. *Id.*, ¶ 233. AT&T Texas (known as SBC Texas at the time) initiated a proceeding at the Public Utility Commission of Texas to address implementation of the rules regarding whether and where AT&T Texas is required to unbundle high-capacity loops and interoffice transport facilities. AT&T Texas maintained that the FCC's business line rule required it to count "all UNE loops" and all 64 kbps-equivalents on high-capacity loops as "business lines." The Texas Commission agreed. Pet. App. 30a-32a, 35a-36a. Petitioner challenged that decision in district court and at the Fifth Circuit, but lost both times.

REASONS FOR DENYING THE PETITION

There is no reason for this Court to review the Fifth Circuit's decision. *First,* there is no conflict between circuits on the proper interpretation of the FCC's business line rule, for only the Fifth Circuit has addressed this issue. Indeed, there is no conflict at any level, for all of the federal district courts that have ruled on the issue agree with the Fifth Circuit, as do all but one of the state public utility commissions that have ruled on the issue. Moreover, review would be premature because the same issue remains pending before the FCC on a petition for reconsideration of the *TRRO*.

Second, the Fifth Circuit's decision is plainly correct. The Fifth Circuit interpreted Rule 51.5 according to its plain language: interpreting "all" to mean all, "shall" to mean shall, and "each" to mean each.

The Fifth Circuit's decision also allows the FCC's rule to be implemented by using only objective, readily available data, as the FCC intended.

I. THERE IS NO CONFLICT REGARDING THE PROPER COMPUTATION OF "BUSINESS LINES" UNDER THE FCC'S RULE

The Fifth Circuit is the only court of appeals to have addressed how to compute the number of "business lines" in a wire center under the FCC's Rule. While petitioner tries (at 22) to conjure a conflict by citing the D.C. Circuit's decision in *Covad Communications Corp.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006), the issue of how to count business lines was not before the D.C. Circuit and not addressed in the D.C. Circuit's opinion. The D.C. Circuit addressed various challenges to the FCC's unbundling rules on high-capacity loops and interoffice transport, but none of them involved the counting methodology for business lines. *See Covad*, 450 F.3d at 537-38, 543, 548 (describing issues raised). The language petitioner cites for a purported "conflict," Pet. 22, is mere dicta in a footnote and has nothing to do with any issue before that court or with the methodology for counting business lines.[3]

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[3] To grant certiorari, "there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." E. GRESSMAN, ET AL., SUPREME COURT PRACTICE 241 (9th ed. 2007). *See also United States* v. *Dalm*, 494 U.S. 596, n.2 (1990) (Stevens, J., dissenting) ("no relevant conflict exists" because the Court of Appeals did not "sp[eak] to the question at issue here," and "to the extent it did so, its remarks were obviously dicta").

Furthermore, there is a good reason why the parties in *Covad* did not raise the issue of how to compute business lines under the FCC's rule: various CLECs had already raised that very issue in a petition for reconsideration of the *TRRO* that was then pending (and is still pending) before the FCC. C.A. R. 21, Ex. 12. Accordingly, to the extent there could be any legitimate debate over how to properly count business lines under the FCC's rule (which there cannot), the FCC itself can resolve it.

Not only is there no conflict among decisions at the circuit court level, there is no conflict at any level. Aside from the decision affirmed by the Fifth Circuit, only two district courts have addressed how to compute "business lines," under the FCC's rule, and both reached the same result as the Fifth Circuit. *Michigan Bell Tel. Co.* v. *Lark,* 2007 WL 1343691, at *3 (E.D. Mich. 2007) (No. 06-12374) ("The Court declines to transform the unambiguous phrase 'all UNE loops' to mean only some UNE loops"); *Michigan Bell Tel. Co.* v. *Lark,* 2007 WL 2868633, at *9 (E.D. Mich. 2007)(No. 06-11982) (Court refused to "ignore[] the plain language of the regulation, and transform[] an otherwise unambiguous phrase, 'all UNE loops,' to mean only some UNE loops").

Similarly, in addition to Texas, *sixteen* other state public utility commissions (Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, New Hampshire, Ohio, South Carolina, Utah, and Washington, D.C.) have interpreted the FCC's business line rule

in the same way as the Fifth Circuit,[4] while only *one*,

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[4] Final Order Resolving Disputed Issues, Re Momentum Telecom, Inc., 2006 WL 1752312 (Ala. Pub. Serv. Comm'n Apr. 20, 2006); Order, Southwestern Bell Telephone, L.D. d/b/a AT&T Arkansas v. Nuvox Communications of Arkansas, Inc., 2007 WL 4694628 (Ark. P.S.C. Oct. 8, 2007); Decision 06-01-043, Application of Pacific Bell Telephone Co., d/b/a SBC Cal. for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996, 2006 WL 238404 (Cal. P.U.C. Jan. 26, 2006); Order No. PSC-06-0172-FOF-TP, In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc., 2006 WL 656737 (Fla. Pub. Serv. Comm'n Mar. 2, 2006); Order on Remaining Issues, In re: Generic proceeding to Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations to provide Unbundled Network Elements, 2006 WL 758303 (Ga. Pub. Serv. Comm'n Feb. 7, 2006); Arbitration Decision, Access One, Inc., et al.'s Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Tel. Co. to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order, 2005 WL 3359097 (Ill. Commerce Comm'n Nov. 2, 2005); Order, In re Illinois Bell Tel. Co., 2006 WL 4049768 (Ill. Commerce Comm'n Dec. 6, 2006); Order, In the Matter of the Indiana Utility Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communication Commission's Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order, 2006 WL 618004 (Ind. Util. Regulatory Comm'n Jan. 11, 2006); Order Determining Proper Method for Fiber-Based Collocator and Business Line Counts, In the Matter of the Complaint of Post-Interconnection Dispute Resolution of Southwestern Bell Tel. L.P. Against NuVox Communications of Kan. Inc. Regarding Wire Center UNE Declassifications, 2006 WL 2360900 (Kansas Corp. Comm'n June 2, 2006); Order Denying Petitions for Reconsideration, In the Matter of the Complaint of Post-Interconnection Dispute Resolution of Southwestern Bell Tel. L.P. Against NuVox Communications of Kan. Inc. Regarding Wire Center UNE Declassifications, 2006

North Carolina, has disagreed.[5] The existence of a

WL 2794797 (Kan. Corp. Comm'n July 20, 2006); Order Nos. U-28356, U-28131, In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Change-of-Law, 2006 La. PUC LEXIS 250 (July 25, 2006); Final Order, In Re: Order Establishing Generic Docket to Consider Change-of-Law to Existing Interconnection Agreements, 2006 Miss. PUC LEXIS 680 (Oct. 20, 2006); Report and Order, In the Matter of the Application of NuVox Communications of Missouri, Inc. for an Investigation into the Wire Centers that AT&T Missouri Asserts are Non-Impaired Under the TRRO, 2008 WL 1795031 (Mo. Pub. Serv. Comm'n Mar. 31, 2008); Order No. 24, 723, Verizon N.H. Supplemental Wire Centers Qualifying for Relief from Certain Unbundled Services, 2007 N.H. PUC LEXIS 2 (Jan. 5, 2007); Arbitration Award, In the Matter of the Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communication's Commission's Triennial Review Order and its Order on Remand, 2005 WL 3018712 (Ohio P.U.C. Nov. 9, 2005); Finding and Order, In the Matter of the Petition of XO Commc'ns, Inc. Requesting a Commission Investigation of Those Wire Centers that AT&T Ohio Asserts are Nonimpaired, Case No. 05-1393-TP-UNC, 2006 WL 1540270 (Ohio P.U.C. June 6, 2006); Order Addressing Changes of Law, Re BellSouth Telecommunications, Inc., 2006 WL 2388163 (S.C. Pub. Serv. Comm'n, Mar. 10, 2006); Report and Order, In the Matter of Investigation of Qwest Wire Center Data, 2006 WL 4043040 (Utah Pub. Serv. Comm'n Sept. 11, 2006); Order No. 13836, Re Verizon Wash., DC, Inc., 2005 WL 3541003 (D.C. Pub. Serv. Comm'n Dec. 15, 2005).

[5] Petitioner claims that the Oklahoma and Oregon state commissions have ruled differently from the Fifth Circuit, but that is incorrect. The Oklahoma "decision" that petitioner cites (Pet. 21) is merely the recommendation of an Arbitrator and has no effect unless and until approved by the full Oklahoma Commission, which it has not been. And while the Oregon Commission initially did not allow all 64 kbps-equivalents to count as "business lines," Pet. 20, it later reversed course and approved a settlement that allows all 64 kbps-equivalents to count as business lines, stating that this was "a reasonable interpretation of the

single outlier decision, especially one at the state commission level that is subject to correction by the commission itself or lower courts, is not a compelling reason to grant certiorari.[6] *See* Rule 10; E. GRESSMAN, ET AL., SUPREME COURT PRACTICE 256 (9th ed. 2007).

II. THE FIFTH CIRCUIT WAS CORRECT ON THE MERITS

Lacking any conflict, petitioner asks the Court to review the Fifth Circuit's decision because petitioner believes it was wrongly decided. That alone is not sufficient to grant certiorari, see Rule 10, but more importantly it is not true. Rule 51.5 sets forth the FCC's instructions for how to compute "business lines" in a wire center, and it provides that business line tallies "shall" include "the sum of all UNE loops connected to that wire center" and "each 64 kbps-equivalent."

The Fifth Circuit interpreted the rule according to its plain language, finding that (1) the FCC's instruction to count "all UNE loops" as "business lines" means just what it says – that all UNE loops are included in the business line count, and (2) the FCC's instruction to count "each" 64 kbps-equivalent circuit in a digital loop as a "business line" means just what it says – that each 64 kbps-equivalent counts as one business line.

TRRO." Order on Reconsideration, In re Covad Commc'ns Co., UM 1251, 2007 WL 2236375, *5-*6 (Or. Pub. Util. Comm'n, July 31, 2007).

[6] Petitioner criticizes AT&T Texas' North Carolina affiliate for not appealing that decision. Pet. 22. AT&T North Carolina did not appeal because the decision had little or no real-world effect on its resulting unbundling obligations.

There is no ambiguity in the FCC's rule. Indeed, the structure of the sentence referring to "all UNE loops" confirms that the FCC knew how to indicate that a line must actually serve a business customer in order to count, but deliberately did not impose that limitation for UNE loops. In the sentence of Rule 51.5 that defines how "business lines" are to be computed, the FCC used the word "business" as a qualifier for the separate component of "incumbent LEC business switched access lines" but conspicuously did not use it before "UNE loops." Similarly, in the *TRRO* the FCC explained that its rule is based on the sum of "ARMIS 43-08 *business* lines [*i.e.*, the incumbent's lines serving its business customers], plus *business* UNE-P, plus UNE-loops." *TRRO*, ¶ 105 (emphasis added). As the Fifth Circuit observed: "The FCC knew how to demarcate lines used to serve businesses and did not do so in the case of UNE loops." Pet. App. 6a.

There also is no ambiguity regarding 64 kbps-equivalents. While petitioner argues that the FCC's rule merely says that a 64 kbps-equivalent counts as one "line," not necessarily a "business line," Pet. 18, the plain language of the FCC's rule refutes that claim. A DS1 digital loop can carry a maximum of 24 64 kbps-equivalents. Not all of those circuits will necessarily be used, and those that are used will not necessarily be used for business customers. Nevertheless, the FCC's rule expressly states that "a DS1 line corresponds to 24 64 kbps-equivalents, *and therefore to 24 'business lines.'*" 47 C.F.R. § 51.5 (emphasis added). As the Fifth Circuit observed, "[n]owhere does this example require separating the 24 lines into those that serve business customers and those that do not. Instead, it seems to illustrate just the opposite result by requiring that each 64 kbps-

equivalent should be counted as a separate line without reference to its use." Pet. App. 10a.

Finally, counting all UNE loops and 64 kbps-equivalents as "business lines" is consistent with the FCC's requirement to rely only on data that is objective, verifiable, readily available, and reported by the incumbent LEC. *TRRO*, ¶¶ 105, 108. It is undisputed that incumbent LECs do report, for other regulatory purposes, their total number of all UNE loops and 64 kbps-equivalents on high-capacity loops, but do *not* separately identify and report the number of UNE loops or 64 kbps-equivalents used only to serve business customers. C.A. R. 21, Ex. 13 at 12 & Ex. 14 at 15-16; Pet. App. 16a-19a. The Fifth Circuit thus properly rejected petitioner's interpretation of Rule 51.5 because – contrary to the FCC's design – it would require ILECs to obtain information from CLECs regarding whether loops are being used to provide residential or business service, data or voice service, and switched or non-switched service. Pet. App. 7a-8a. The FCC expressly rejected this type of line-by-line analysis and reliance on CLEC-provided data because it would be "exceedingly difficult" and "impractical and unadministrable." *TRRO*, ¶¶ 157-159. The Fifth Circuit's decision is therefore consistent with the FCC's intent as well as the plain language of the FCC's rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

LOGIX COMMUNICATIONS, L.P., DOING BUSINESS AS LOGIX COMMUNICATIONS, PETITIONER

v.

THE PUBLIC UTILITY COMMISSION OF TEXAS, PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS, JULIE CAURTHERS PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS, BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS, AND SOUTHWESTERN BELL TELEPHONE, L.P., DOING BUSINESS AS AT&T TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

Based on over 150 years of precedent from this Court, one issue should not be in dispute. The words as used by the FCC control the interpretation of the FCC's rule defining a "Business Line" (the "Rule").

Consistent with this Court's guidance, Petitioner Logix focused on the precise text of the FCC's rule defining a Business Line, which is quoted in full in the Petition. Respondent AT&T, on the other hand, obscures the text of the FCC in its Brief in Opposition. Instead of quoting the Rule correctly, AT&T has cut-and-pasted the rule adding and deleting words to create a new and different rule. AT&T creates a rule that it likes. But, the rule AT&T creates is not the rule written by the FCC. It is the rule as drafted by the FCC when read completely and consistently that demonstrates the error to count residential lines within the tally of Business Lines and the error to include "lines" that are not switched access lines used to serve a business customer within that tally.

AT&T distorts its scorecard of decisions from other jurisdictions. First, AT&T erroneously disregards the statement from the United States Circuit Court for the District of Columbia in *Covad Communications Company v. FCC, 450 F.3d 528 (D.C. Cir. 2006)* – *that* "[a] business line is a loop that runs from the wire center to a business customer." – as *dicta*. Regarding other lower court and state regulatory rulings, Petitioner Logix acknowledged that a majority of such decisions favored AT&T's arguments. However, AT&T again overstated its scorecard. In addition to the District of Columbia Circuit Court decision above, substantive and at times exhaustive state commission

decisions and/or arbitrator reports in North Carolina, Oregon, and Oklahoma reach the same conclusions and interpretation of the FCC's Business Line definition as is advocated by Logix in this matter.

Finally, AT&T suggests process could control over a strict reading of the language. This argument of AT&T fails for two reasons. First, process does not trump the substantive requirements of the FCC as demonstrated by the Rule's definition of a Business Line. Second, process arguments made by AT&T misstate the record. The record demonstrates – as has been implemented elsewhere – whichever interpretation of the Rule the Court adopts there will be an objective and administratable process to implement it.

REPLY ARGUMENT

I. The FCC's Rule must be Interpreted as the FCC Drafted It, Not as One of the Respondent's Paraphrased and Redrafted It

As this Court has reiterated repeatedly, the words used by lawmaking and regulatory bodies have meaning. AT&T's flawed approach conflicts with over 150 years of U.S. Supreme Court precedent on statutory interpretation that makes clear that the interpretation of a statute or regulation "begins where all such inquires must begin: with the language of the statute itself."[1] Where the language is plain, "the sole

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[1] *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L. Ed.2d 290 (1989) (*Ron Pair Enterprises*). See also *Estate of Cowart v. Nicklos Drilling, Co.* 505 U.S. 469, 475-476, 112 S.Ct. 2589, 2594, 120 L. Ed2d 379 (1992)(stating, "The controlling principle in this case is the basic and unexceptional rule

function of the courts is to enforce it according to its terms"[2] with the plain meaning being deemed to be conclusive except in rare cases.[3] Unless there is an explicit statement to the contrary, words are to be given "their ordinary and usual sense and with the meaning commonly attributed to them."[4] Finally and directly applicable here, the language will be reviewed in its entirety giving meaning to all provisions to effectuate the intent and policy of the whole.[5]

A. Respondent AT&T misstates the Rule by cutting and pasting different portions of the Rule together while omitting key language.

The relevant portion of 47 C.F.R. § 51.5, is as follows (with emphasis added):

> Business line. **A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC.** The number of business

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that courts must give effect to the clear meaning of statutes as written.); *Landreth Timber Co. v. Landreth* 471 U.S. 681, 685, 105 S. Ct. 2297, 2301 (1985).

[2] *Ron Pair Enterprises*, 489 U.S. at 241, 109 S.Ct. at 1030. See *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194 (1917). See also *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149-1150 117 L. Ed.2d 391 (1992)(stating that [w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'." *quoting Rubin v United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981).

[3] *Rubin*, 449 U.S. at 430, 101 S. Ct. at 701; see also *Germain*, 503 U.S. at 253-254, 112 S. Ct. at 1149.

[4] *Caminetti* at 242 U.S. at 485-486, 37 S.Ct. at 194.

[5] *Boisdore*, 49 U.S. at 122.

> lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. **Among these requirements**, business line tallies (1) **shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services**, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one **line**. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

A comparison of Logix's Petition and AT&T's Brief in Opposition with regard to the manner in which each has analyzed the Rule is telling. Logix's Petition is directly focused on a full, detailed review of the FCC's Rule. Beginning on Page 13 of Logix's Petition, Logix begins a sentence-by-sentence review of 47 C.F.R. § 51.5 that continues to Page 19. Over those six (6) pages, the Petition includes a detailed discussion of each sentence applying statutory rules of construction to demonstrate that:

i. The first sentence establishes three basic conditions for finding that a line qualifies as a "Business Line": (1) only a line **used to serve a business** customer (as opposed to residential) may be considered; (2) the **line must be a switched access line**; and (3) whether the line should be counted is not affected by whether it is served by SBC/AT&T or by a competitive local exchange carrier ("CLEC") leasing the line from

SBC/AT&T.

ii. The second sentence in the definition identifies which lines served by ILECs and CLECs should be candidates for meeting the Business Line criteria. "Incumbent LEC switched access lines" are candidates and for purposes of counting leased loops, the FCC looked to "the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements."

iii. The third sentence of the Business Line definition, which is tied to the second sentence by the language used, addresses what may and may not be included in "business line tallies" when applying the second sentence. "Among[6]

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[6] "Among" is defined as "in conjunction with" and/or "intermingled with". (emphasis added to citations below)

RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE - UNABRIDGED, Random House Inc. (2nd ed. 1987) AT 208. (The first definition states: "in, into, or through the midst of; in **association or connection with**; surrounded by.)

AMERICAN COLLEGE DICTIONARY, Random House Inc. (1958) at 212. (The first definition states: "in, into, or through the midst of; in **association or connection with**; surrounded by".)

OXFORD ENGLISH DICTIONARY, Oxford University Press (1971) at 215. (The first definition states: "In the mingling and assemblage of; hence, surrounded by **and association with**".)

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY - OF THE ENGLISH LANGUAGE -

these requirements" as they are contained in the second sentence, a valid count must meet the following: (1) The Business Line count must include only those lines connecting end-users to ILEC end-offices for "switched services." (2) The business line count "shall not include non-switched special access lines." And (3) when accounting for ISDN and other digital access lines, ILECs count "each 64 kbps-equivalent as one **line**." (as opposed to one **Business Line** as AT&T attempted to redraft the Rule).

iv. The fourth sentence includes an example showing how the lines would be counted if all of the requirements in the third sentence are met, i.e. whether a 64 kbps equivalent "line" constitutes a Business Line, rather than a "line" that would not be counted, depends on whether that line satisfies the evaluative criteria of the FCC's definition. If all 24 of the 64 kbps-equivalent lines on an incumbent's DS1 facility (1) are connected to an end-user business customer, (2) are providing switched services, and (3) are provided by either the ILEC or a CLEC leasing a UNE loop, then, applying the third requirement to each of the 24 lines, the DS1 facility will have 24 Business Lines pursuant to the FCC's definition because each of those 24 "lines" independently meet the evaluative criteria of the Rule.

UNABRIDGED, Merriam-Webster, Incorporated (2002) at 219. (The first definition states: "surrounded by : in the midst of : **intermingled with**.)

In contrast to Logix's detailed discussion of the Rule, AT&T relies on selective picking of words and phrases out of context of the full Rule. Page 4 of AT&T's Brief in Opposition shows numerous cutting and pasting of the Rule that gives an inaccurate reading of the words actually used by the FCC. For example, AT&T brief states:

> The FCC's rules states that incumbent LECs "shall account" for such loops "by counting *each* 64 kbps-equivalent" channel in the loops as one "business line".[7]

But, what the rule actually says in subpart three of the third sentence is:

> (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one **line**.

To get the interpretation it wants, AT&T changed the words and added the word "business" in front of the word "line" when the FCC chose not to do so. AT&T's rewriting of the rule changes the meaning.

The FCC's Rule supports Logix's position that once a transmission path if determined to be a "line", it then has to be determined if the "line" is a **switched access line used to serve a business** customer. Based on the language in the Rule, if the answer is 'yes', the line is a Business Line. If the answer is 'no', the line is not a Business Line. By cutting and pasting different parts of the Rule and decoupling other portions of the Rule, i.e. the second and third sentences

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[7] AT&T Brief in Opposition at 4.

that the FCC explicitly tied together, AT&T misquotes the Rule language. It is AT&T's version of the rule – **as compared to the FCC's Rule language** – that misses this key distinction.

The Rule requires that each 64 kbps-equivalent stands alone from a counting perspective as a single "line" to be evaluated separately to determine if that "line" meets the criteria of a "business line", i.e. is the "line" **used to serve** a **business customer** with a **switched access service**?

B. The Importance of the Words Used by the FCC is highlighted by AT&T's attempt to rewrite it.

The approaches of Petitioner Logix and Respondent AT&T are telling. Logix has focused on the words as used by the FCC as the keystone to interpreting the FCC's intent. Logix quotes the Rule in full, discusses the requirements of each sentence, and discusses how the FCC tied specific sentences together to reach a coherent and internally consistent result. AT&T disassembled the Rule within its textual discussion avoiding a review of the Rule in its entirety The result is a story that is consistent with the result AT&T seeks but not consistent with the words used by the FCC.

II. Respondent AT&T Understates the Relevance of Decisions that are Contrary to Its Position

AT&T also seeks to persuade the Court by arguing its version of a scorecard of lower court and state regulatory rulings. Logix specifically acknowledged in its Petition that the Fifth Circuit Court decision was consistent with the majority of

rulings on this issue. But, AT&T overstates its case.

First, AT&T completely disregards the statement from the United States Circuit Court for the District of Columbia in *Covad Communications Company v. FCC, 450 F.3d 528 (D.C. Cir. 2006)* – *that* "[a] business line is a loop that runs from the wire center to a business customer." – as *dicta*. This characterization is not correct. As AT&T admits at Page 3 of its Brief in Opposition:

> The FCC established its latest set of unbundling rules in its *TRRO* in February 2005. Those rules, including the business line rule, were upheld on appeal. *Covad Communications Company v. FCC, 450 F.3d 528, 541-546 (D.C. Cir. 2006).*

AT&T admits that the legality of the Business Line Rule was before District of Columbia Circuit Court. Given that that court was considering the legality of the Business Line rule, statements about what that Rule requires was germane to that decision. As explained in Black's Law Dictionary, obiter dictum is a remark "not directly upon the question before the court."[8] But, the meaning of the Business Line rule was directly before the court in *Covad Communications Company v. FCC* because that court could not reach a conclusion on the legality of the Rule without having an understanding of what the Rule requires. Instead, that court stated its reading of the Rule that "[a] business line is a loop that runs from the wire center to a business customer." *Id. at Covad Communications Company at 534.*

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[8] Blacks Law Dictionary (8th ed. 2004) (definition of obiter dictum) *quoting* William M. Lile et al., *Brief Making and the Use of Law Books* 304 (3d ed. 1914).

With regard to state regulatory rulings, AT&T overstated its position A review of state orders demonstrates that the majority of the state commissions did not engage in the complete process to interpret the language of the Rule. As an example, the Public Utility Commission of Texas' ("PUCT's") decision did not even reference the Rule when it decided to include residential loops in the Business Line count; and the PUCT only gave a passing reference to the Rule when it chose to include unused and data only capacity in the Business Line count.

A review of state commission rulings is also fluid. For example, the Oregon Commission's substantive ruling was released between the date of Logix's Initial Brief and Appellees' Response Briefs while the Parties were before the Fifth Circuit Court. AT&T seeks to discount the ruling of that commission because there was a subsequent approved settlement between the competitors and incumbent local exchange carrier in that region. But, a subsequent settlement does not change the fact that with the guidance of state commission decisions referenced by AT&T in its Brief in Opposition, the Oregon Commission held in favor of positions articulated by Logix here while finding that the North Carolina Commission had engaged in the most appropriate review of the Rule. *See pages 19-20 of Logix's Petition for a discussion of the orders from the North Carolina and Oregon Commissions.*

Finally, although AT&T seeks to discount the *Oklahoma TRRO Report* because that ruling was by that Commission's administrative law judge ("ALJ") and could be overturned by that commission on appeal, AT&T does not attack the extensive discussion and reasoning in that report nor acknowledge that the

Oklahoma Commission has let that report stand for over two (2) years.

III. AT&T Misstates the Record Regarding Administrative Burdens Implementing the Rule

In the Brief in Opposition at Page 13, AT&T goes outside the language of the Rule to argue that the objective for simplicity can only be achieved if its interpretation of the Rule is adopted. First, the Rule language speaks for itself. An objective favoring simple does not replace the Rule as written. Second, the statements of intent by the FCC in the *TRRO* explaining the use of Business Lines as a proxy for potential revenues support Logix in this matter. Third, AT&T misstates the record and ignores the fact that the Rule as discussed by Logix has been implemented elsewhere.

The record identified two different administratable, simple ways to implement the 64-kbps equivalency in the Rule correctly and appropriately.[9] As such, the goal to rely on data that is objective in order to have a workable process will be met without regard to the interpretation of the Rule adopted by this Court.

What the FCC did explain is that Business Line thresholds are the proxies used by the FCC for such potential competition. *TRRO ¶¶ 93 and 103.* The FCC found that "the record shows a correlation between the number of **business lines** and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served

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[9] See *North Carolina TRRO Order* at 67-68.

via that wire center." *TRRO ¶ 43 (emphasis added).* The FCC used this proxy because these "revenue opportunities" arise primarily from the competitors' ability to serve a large number of business customers in the particular wire center (as opposed to residential lines). As a result, the tally of Business Lines does not include **all** lines, but rather only those **business** lines that would provide a useful proxy for determining where significant revenue opportunities may exist.

If the Court looks beyond the language of the Rule itself to the *TRRO* for guidance, these substantive provisions provide guidance behind the scope and purpose for the Business Line definition. Process does not define substance, and process can and will tend to itself. Workable and objective alternatives are available to state commissions once the substantive requirements are settled.

CONCLUSION

For the above reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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